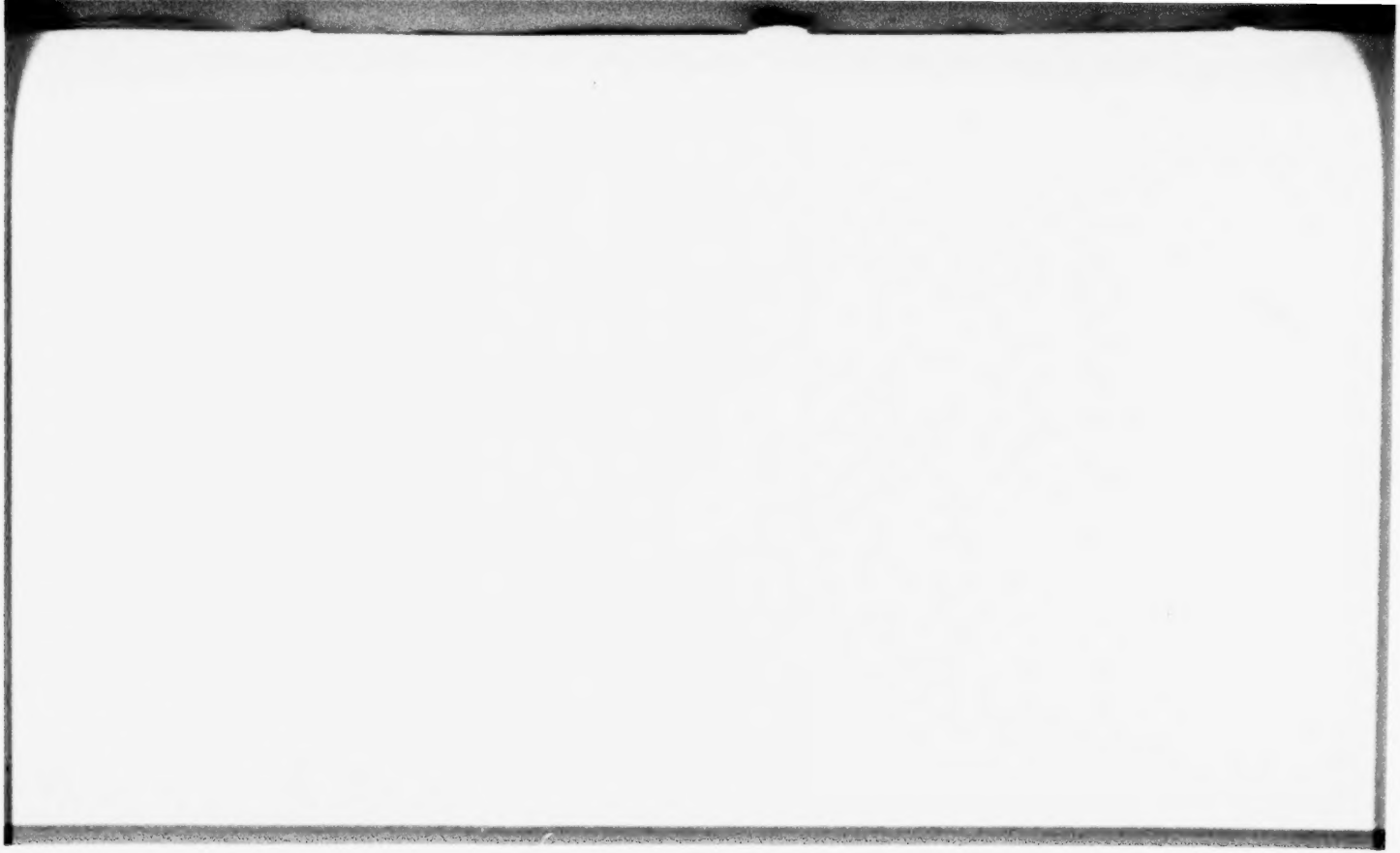

FILED
JAN 23 1905
JAMES H. McKENNEY,
Clerk.

No. 512.

Supreme Court of the United States,

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
(SUPPLEMENTAL TO ARGUMENT IN PETITION).

JOHN F. DILLON,
R. V. LINDABURY,
BAINBRIDGE COLBY,

WILLIAM D. GUTHRIE,
R. S. LOVETT,
MAXWELL EVARTS,
Of counsel for appellees.

WASHINGTON, January 23, 1905.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The following memorandum is merely supplemental to the arguments submitted in the petition, which it is deemed unnecessary to repeat. It is, however, considered advisable somewhat to amplify the discussion and points and to cite authorities to which the court may desire to be referred. This memorandum also may anticipate and cover suggestions on behalf of the respondent Northern Securities Company and, perhaps, avoid the necessity of applying for leave to file any further brief.

The following are the pages of the petition upon which the various points are presented:

1. Practical effect of the injunction order and balance of convenience (pp. 7–12).
2. The issues, evidence and decision in the Government suit (pp. 13–27).
3. The *prima facie* case presented to the court below upon uncontradicted evidence (pp. 28–40).
4. The contention that even if the question of ownership was not decided by this court in the Government suit, nevertheless, upon the termination and abandonment of the enterprise and the contemplated dissolution of the company, the petitioners were entitled to the return of their property (pp. 40–43).

5. The proposed plan tends to circumvent and evade the decree in the Government suit (pp. 43–48).
6. The inequity of permitting the original depositors of Great Northern stock now to receive, through the instrumentality of the illegal combination, a majority of the capital stock of both of the Railway Companies (pp. 49–58).
7. The practice of the Circuit Court of Appeals in proceeding to a disposition of the whole controversy upon the merits, notwithstanding that there were disputed questions of law and fact and that the court of original jurisdiction did not abuse its discretion (pp. 58–65).

I.

As to jurisdiction.

The jurisdiction of this court to issue the writ of certiorari in the present case is not open to dispute. Under the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, the power of this court extends to every case pending in a Circuit Court of Appeals and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court. This power is co-extensive with all possible necessities, and it is sufficient to secure to this court a final control over litigation in all these courts of appeal. *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, 384; *Forsyth* v. *Hammond*, 166 U. S. 506, 514.

The jurisdiction of the circuit court under the act of August 13, 1888, c. 866, § 1, 25 Stat. 433, was not based upon the fact that the case arose under the Constitution or laws of the United States (*Carson* v. *Dunham*, 121 U. S. 421), but was based entirely upon a contro-

versy between citizens of different states. The case therefore, is one which would be finally determined in the Circuit Court of Appeals, and consequently is within the class made subject to review by this court on certiorari.

The verified bill showed the requisite diversity of citizenship. The complainants are all citizens and residents of states (New York and Utah) other than the states of which the defendants are citizens and residents (New Jersey and Wisconsin), and the subject-matter of the controversy is the title, custody and disposition of personal property actually located within the district in the possession of the defendant Northern Securities Company (pp. 2, 6).

The eighth section of the act of Congress of March 3, 1875, 18 Stat. 470, 472, confers upon the circuit courts of the United States jurisdiction to proceed notwithstanding the absence of a non-resident defendant where the necessary diversity of citizenship exists and the suit is brought to enforce a "legal or equitable lien upon or claim to . . . personal property within the district where such suit is brought." The statute provides that if the non-resident defendant be not found within the district, "or shall not voluntarily appear thereto," an order for substituted service may be made. In the case at bar, such an order was made on the 26th day of April, 1904 (supp. trans., pp. 1–2), and the defendant Northern Pacific Company was duly served under such order, as appears by the proofs filed at the time in the clerk's office (*ib.*, p. 2). The certificates of stock in controversy are within the dis-

trict of New Jersey in the possession of the Securities Company, and the claims of the complainants thereto can be determined without affecting any rights of the Northern Pacific Company. The case is clearly a proper one for substituted service under the statute. *Merritt* v. *American Steel Barge Co.*, 79 Fed. Rep. 228, 235; *Ryan* v. *Seaboard Railroad Co.*, 83 Fed. Rep. 889, 890; *Simpson* v. *Jersey City Contracting Co.*, 165 N. Y. 193, 197; *Puget Sound Nat. Bank* v. *Mather*, 60 Minn. 362, 363. Moreover, it was not suggested to the Circuit Court that the Northern Pacific Company had not been duly served, although counsel declined to appear for it. The denial of the fact of due service on the Northern Pacific Company appeared for the first time on appeal and then only in the assignment of errors in the Circuit Court of Appeals (p. 430).

As to the jurisdiction of a court of equity, it appeared that there was no plain, adequate and complete remedy at law. The bill alleged that all the Northern Pacific stock claimed by the complainants is now registered in the name of the Northern Securities Company and that it holds the certificates in its possession (p. 6). There is no procedure or machinery at law to compel the Securities Company to execute the necessary transfers. A decree of a court of equity acting *in personam* is indispensable for that purpose. A writ of replevin would afford no adequate or complete remedy, for it would leave a resort to equity still necessary to perfect the legal title. The threatened distribution of the complainants' stock among 2,531 persons (p. 329) must necessarily produce irreparable injury to the com-

plainants if they be finally adjudged to be entitled to the stock, and would obviously involve a multiplicity of suits to recover the property.

II.

AS TO THE EFFECT OF THE ST. PAUL DECISION (128 FED. REP. 808.)

The petitioners, before instituting any independent suit, applied to the Circuit Court of Minnesota for leave to intervene at the foot of the decree in the Government suit. They conceived this to be proper in view of the opinion of this court and the express provision in its mandate that the decree "is hereby affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require" (record, p. 236; 193 U. S. 360). The Circuit Court, however, refused to grant leave to intervene notwithstanding the express power "to proceed in the execution of its decree as the circumstances may require," and evidently assumed that nothing further needed to be done so far as the Government was concerned, and that the petitioners should be remitted to a new suit in a proper tribunal, saying (128 Fed. Rep. 808, 813):

> "If it so happens that the decree of this court in favor of the Government creates a situation which shall give rise to controversies between stockholders of the Securities Company as to how the holdings of that company in the two railway companies ought to be distributed, or what should be done with such holdings, *these are questions which can be settled among the stockholders themselves, who are more immediately concerned in these questions, and according to those principles of law and*

equity which any court having general common law and equity powers is competent to enforce."

The court, therefore, clearly did not intend to pass upon or even to consider the controverted questions of fact and law presented by the petition and affidavits. Circuit Judge Dallas says in the opinion of the court below that "the ground of that application was substantially the same as that upon which this bill is founded" (opinion, p. 15). Assuming this to be true for argument's sake, the learned judge quite overlooked the fact that Circuit Judge Thayer, speaking for the Circuit Court composed of *four* Circuit Judges, did not pass upon the questions of fact then presented or decide the merits. On the contrary, the language of Circuit Judge Thayer was as follows (at p. 811):

> "But the issues suggested by these affidavits and excerpts are disputed and debatable questions of fact which the parties would be *entitled to litigate*, and with witnesses and evidence after leave to intervene had been granted, and we decline to consider them or the affidavits and excerpts which present them upon this motion. We consider and determine this application upon the petition for leave to intervene alone."

The refusal of leave to intervene was discretionary and not appealable (*Credits Commutation Co.* v. *United States*, 177 U. S. 311), and in refusing leave the Circuit Court of Minnesota was not attempting and did not intend to prejudge or prejudice the merits of a controversy which it declined to consider or decide. And yet, though that court distinctly and unequivocally declared that the petitioners "would be entitled to litigate and with witnesses and evidence" the questions involved on the merits, and declined to consider the

proofs upon those questions, nevertheless that disposition and *refusal to adjudge* is now urged as a *decision* on the merits. It is most earnestly submitted that the Circuit Court of Minnesota never for a moment conceived it possible that any court would interpret its opinion in such a way as to dispense with any further "litigation with witnesses and evidence" upon the questions which the *four* Circuit Judges then declined to decide. If the Circuit Court at St. Paul had considered the disputed facts, undoubtedly it would have ruled that there were "disputed and debatable questions of fact *which the parties would be entitled to litigate and with witnesses and evidence*," and that until such questions of fact had been investigated and litigated the *status quo* ought to be maintained. It would also have considered the opinion of this court as conclusive upon any material question discussed by it.

Mr. Justice Gray said, speaking for this court in *In re Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, 255:

> "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal, or intermeddle with it, further than to settle so much as has been remanded. . . . The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate."

It is quite true that the application of the petitioners to the Circuit Court of Minnesota was opposed by the Attorney-General of the United States because, perhaps, he conceived that it would be importing into the Government suit the subject-matter of a private litigation. The Attorney-General, however, it is humbly conceived, may have been in error. It ought surely to be a matter of profound concern to the Government that the directors of the Northern Securities Company were charged on verified petition with acts tending to circumvent and evade the solemn decree of the Supreme Court of the United States. The charge then made under oath was that the promoters of the Northern Securities Company were deliberately attempting to circumvent and evade the decree of this court while professing to be "fully and unreservedly and without delay complying" with it. The four Circuit Judges said that the "parties would be entitled to litigate" this question. Indeed, no question more deeply affecting the public interests could ever have been presented. The charge made and the issue tendered went to the very fundamentals of our system of government: it involved, in a word, the great question whether the managers of these enormous corporations could, in defiance of the law, proceed to render the decree of the Supreme Court of the United States a mere *brutum fulmen*, under cover of which they would nevertheless accomplish their original illegal purposes.

III.

AS TO THE RULE IN REGARD TO APPEALS FROM ORDERS GRANTING PRELIMINARY INJUNCTIONS.

The *four* Circuit Judges in Minnesota concurred in declaring that there were "disputed and debatable questions of fact which the parties would be *entitled to litigate and with witnesses and evidence.*" District Judge Bradford, sitting as Circuit Judge, held that there were controverted questions of fact which ought to be investigated and grave and difficult questions of law to be solved before the rights of the parties should be finally adjudicated. Circuit Judge Gray concurs fully in that view and conceives it unjust to irrevocably dispose of the litigation until there has been such a judicial investigation. We thus have the declaration of *six* judges that the complainants were entitled to litigate the questions presented in good faith by their bill, and the declaration of only two judges to the effect that the complainants are not entitled to litigate those questions, but that the controversy should be disposed of at once without considering more than one of the points presented, and that, too, a point not even mentioned by Judge Thayer or Judge Bradford.

The Circuit Court of New Jersey, after an examination of the affidavits and documents submitted on both sides, held that a *prima facie* case had been made out, and determined to exercise its discretion in favor of granting a preliminary injunction for the purpose of preserving the *status quo* until the question of right between the parties could be decided on final hearing. It seemed to the court that this action would

be eminently proper, fair and just in view of all the circumstances of this case, because the controversy fell within the established rule of courts of equity to preserve and maintain the existing condition of affairs whenever the ultimate questions of law or fact are grave and difficult and the injury to the moving party would be irreparable if the injunction were refused, particularly where a bond would cover all possible damages the defendant might sustain by reason of the injunction. Hence, the court decided that the complainants were entitled to have the controverted questions of fact and law investigated and determined upon pleadings and proofs according to the ordinary procedure of courts of equity and to be accorded their day in court on final hearing for that purpose. It undoubtedly conceived that it would be unjust to the parties and unwarranted by the rules governing the exercise of its discretion to decide the merits upon an incomplete case and *ex parte* affidavits, which might prejudice one side or the other and operate to prejudge a controversy in the absence of all the facts.

The propriety of granting the order might well be rested upon the following lucid statement of the Circuit Court (record, p. 409):

> " The defense controverts material allegations in the bill, some of which embody averments of fact, and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. *On the face of the bill it is evident* that the final decision necessarily will involve the consideration of *grave, novel and delicate questions of law.* On the presentation of their arguments for and

against the awarding of a preliminary injunction counsel on both sides have with strong insistence urged, and with elaboration and signal ability discussed, a number of legal propositions, important and far reaching in their scope, and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact remains that the eminent counsel advancing them have during a hearing of nearly three days pressed them with zeal and in manifest reliance upon their soundness and materiality. The briefs of argument and authorities, containing nearly 800 printed pages, and principally devoted to the discussion of the principles of law and equity deemed applicable to the case, fairly may be accepted as evidence that much may seriously be said on each side about the law, if not the facts, involved. The case not being ripe for a final decision, the present application is for a preliminary injunction. The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or inconvenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, the injunction

usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree, as between the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the *status quo*, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant. These views are supported by abundant authority to which, were it not for the importance of the case, I should refrain from adverting."

The Circuit Court did not decide the merits of the case; on the contrary, it carefully refrained from passing upon the questions involved in view of their gravity and of the necessity for first ascertaining the

facts. This course evidently commended itself as being fair and just to the defendant. Nor was the court required under the settled practice of courts of equity to hold that the complainants were clearly entitled to a final decree in their favor, for this would turn every motion for a preliminary injunction into a final hearing and adjudication on the merits. The conclusion reached, manifestly after a painstaking examination of the papers submitted, was that it would be in the highest degree unjust to permit the directors of the Northern Securities Company, Mr. Hill and his associates, arbitrarily to decide in their own favor the merits of the controversy, defeat the whole object of the action by distributing to third parties beyond recovery the stock involved in this suit, and denude the company of ninety-nine per cent. of its assets before the controversy could be investigated according to the ordinary procedure with the right to examine and cross-examine witnesses, which the experience of centuries has shown to be best calculated for the ascertainment of the truth. Such a scattering over the world of the subject matter of a litigation might result in a complete failure of justice. It is, therefore, not at all surprising that *the learned majority of the Circuit Court of Appeals conceded that the court below had not abused its discretion.*

The practice of granting an injunction under such circumstances to stay a threatened disposition of property *pendente lite*, which, if not restrained, would render a final judgment wholly ineffectual, is well settled. In such a case, even though the complainant's right may be doubtful, courts of equity seldom refuse to preserve

the *status quo*, and never where any possible damage to the defendant can reasonably be covered by a bond, and the effect of a refusal would be irretrievable. The complainants, in the case at bar, gave a bond in the penal sum of two million dollars, to cover all possible damages; the sufficiency thereof was not questioned, and the responsibility of the sureties was admitted (pp. 424–426). That bond can be increased if delay or other circumstances shall so require.

In addition to the authorities cited in the opinion of the Circuit Court (pp. 410–413) and in the petition (p. 59) upon the practice in equity to grant a preliminary injunction to maintain the *status quo*, reference may be had to the following cases, although the citation of further authorities ought to be unnecessary in support of a proposition so universally recognized by the courts. *Western Union Tel. Co.* v. *Pennsylvania R. Co.*, 120 Fed. Rep. 981, 984, 985; *Cartersville L. & P. Co.* v. *Mayor, &c., of City of Cartersville*, 114 Fed. Rep. 699, 700; *Utah N. & C. R. Co.* v. *Utah, &c., Ry. Co.*, 110 Fed. Rep. 879, 893; *Cohen* v. *Delavina*, 104 Fed. Rep. 946; *United States* v. *Duluth*, 1 Dillon, 469, 474; *Andrae* v. *Redfield*, 12 Blatch. 407, 425; *Charles* v. *City of Marion*, 98 Fed. Rep. 166, 168; *New Memphis Gas & Light Co.* v. *City of Memphis*, 72 Fed. Rep. 952, 953–954; *Jensen* v. *Norton*, 64 Fed. Rep. 662, 664.

As to the balance of convenience and comparative injury, which a court of equity always considers in such cases (*Russell* v. *Farley*, 105 U. S. 433, 438), it is proper to repeat and emphasize the fact that if the

Northern Securities Company distributes the Northern Pacific shares claimed by the complainants as it proposes to do prior to final hearing, and the complainants should ultimately prevail, the final judgment prayed for would be rendered wholly ineffectual and success would be utterly barren.

The argument urged on behalf of the Securities Company in the courts below was that it would work a great hardship to tie up over $300,000,000 of property belonging to over 2,500 stockholders pending the ascertainment of the rights of the complainants in the orderly method usually pursued by courts of justice, and that the delay would embarrass Mr. Hill and his associates and numerous other stockholders anxious to get their *pro rata* share of the assets and to receive income therefrom. No proof was offered showing the existence of any case of particular hardship or showing that the bond given would not cover all possible loss.

It is important to bear in mind, upon this question of comparative inconvenience and injury, that the injunction order simply restrained the transfer and distribution of 717,320 shares of the capital stock of the Northern Pacific Company (p. 423), which is 396,614 shares more than complainants are offered by defendant; and that the order does not prevent the transfer or distribution of the remaining Northern Pacific stock, constituting a majority of the entire outstanding issue (nearly 54 per cent.), nor does it prevent or affect in the slightest degree the distribution of the Great Northern stock held by the Securities Company.

There was no reason, *so far as the order appealed*

from was concerned, why the full amount of Great Northern stock proposed to be distributed among assenting holders, and nearly fifty-five per cent. of all the Northern Pacific stock held by the Northern Securities Company, should not have been at once distributed among the stockholders who were desirous of having a *pro rata* distribution instead of receiving back what their certificates represented. There is no objection to the assenting stockholders of the Securities Company agreeing to any division or distribution among themselves that they may deem proper provided it does not involve taking the Northern Pacific stock belonging to the complainants and distributing it among third parties, and does not tend to evade the decree in the Government suit.

It was also urged that it would be unfair and inequitable to decree restitution as to the complainants and permit distribution *pro rata* as to all the other stockholders. If all the assenting stockholders desire distribution *pro rata* of the railroad stocks in which they are interested and which their certificates represent, what reason is there why they should not have it at once as to the stock they own, namely, all of the Great Northern and fifty-five per cent. of the Northern Pacific stock? Such a distribution among the assenting stockholders according to their wishes would be practically the same as if the stock were now restored to the original depositors or their assigns as authorized by the decree in the Government suit, and thereupon the holders had independently *agreed* among themselves to a distribution *pro rata*,

although such an agreement would be illegal if shown to be a mere cover to perpetuate the joint control and holdings. But, however this may be, the gist of the controversy is not as to the right of assenting stockholders to distribute property which they own in any way they see fit to agree upon, but whether the majority can compel the complainants to surrender their certificates of Northern Securities stock, and take Great Northern shares which they never owned and become stockholders in that company against their will, with consequent possible personal liability, and also compel them to abandon all claim to their Northern Pacific stock as original depositors thereof.

Instead of declaring a dividend of all the stock of each railway company on hand, as is now proposed, there can be a dividend of these shares to the amount of $93,485,281 par value of Great Northern stock and $82,027,338 par value of Northern Pacific stock. This would distribute a majority of both stocks. Such a dividend would enable the assenting stockholders of the Securities Company promptly to receive three-fourths in value of their property, and leave the remainder to be distributed hereafter in case it shall be found that the claim of the complainants is not tenable. This is a perfectly practicable and business-like method, and nothing in the injunction order prevents it. The dividend would be of exactly the same amount now proposed to be distributed in Great Northern stock, namely, $30.17 par value for each share of Northern Securities stock reduced or surrendered (pp. 11, 193),

and more than one-half of the Northern Pacific stock now proposed to be distributed. Each stockholder could then receive a certificate entitling him to a further dividend when this controversy has been finally determined. If the final result were in favor of the complainants, then the reserved twenty per cent. of Great Northern stock would be distributed *pro rata* among the assenting stockholders as a further dividend, and the reserved Northern Pacific stock delivered to the complainants. If, however, the result were in favor of the Securities Company, then the reserved Northern Pacific stock would be distributed *pro rata* among the stockholders, and the reserved Great Northern stock turned over to the Oregon Short Line Company.

In order to demonstrate how easily this can be done, the figures may be tabulated:

Amount of Northern Pacific stock held by Northern Securities Company	$153,759,400
Amount which Oregon Short Line has identified and traced	71,732,062
Leaving for distribution among assenting shareholders	$82,027,338
Amount of stock of Great Northern Railway Company held by Northern Securities Company	$118,124,200
Amount apportionable to Oregon Short Line on proposed distribution *pro rata*	24,638,919
Leaving for immediate distribution among assenting shareholders, in which the complainants have no interest whatever under any theory	$93,485,281

The necessary operation of the preliminary injunction *so far as it injures the defendant*, is only to tie up *pendente lite* $39,661,450 of Northern Pacific stock, in addition to the $32,070,612 par value thereof which the

complainants are offered under the Hill plan of division. This represents only about eleven per cent. of the value of the property of the Securities Company. Six months' dividends at 7 per cent. on this amount would represent $1,388,149, which would only be *delayed* in payment and not otherwise jeopardized, while the bond given by complainants was $2,000,000 (p. 202). The only real damage would be six per cent. on the delayed payment.

IV.

Effect of the decision in the Government suit.

In view of the fact that the present suit indisputably arises out of the condition of affairs created by the decree in the Government suit, and in view of the fact that the proposed plan of distribution is alleged by the directors of the Northern Securities Company to be *necessary* in order to comply with that decree, it seems extraordinary that the Circuit Court of Appeals should have held that such decree nevertheless constituted neither *res adjudicata* nor even a controlling judicial precedent upon any question relating to such distribution. The position of that court seems to be that when the Northern Securities Company is sued by one of its original depositors who was also an original stockholder and *cestui que trust*, it is not estopped from denying the points decided in the prior case, and that any controversy arising on a distribution said to be necessary in order to comply with the decree in the Government suit is to be determined as if such decree had never been rendered.

That the present threatened action of the Securities

Company is claimed by it to be *necessary* in order to comply with the decree in the Government suit was admitted. Thus, the directors of the Securities Company in the resolutions of March 22, 1904, declared that (p. 11)—

> "Whereas, This company desires and intends to comply with the decree in the said suit fully and unreservedly, and without delay; . . .
>
> "Resolved, In consideration of the premises it is declared *necessary* and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with said reduction, *to distribute among its shareholders*, the shares of capital stock of said railway companies held by it."

And this was supplemented by the declaration in the circular to the stockholders as follows (p. 193):

> "Therefore, your Directors at a meeting held this day have, under advice of counsel, decided that in order to fully and promptly comply with the decree in this suit, it is *necessary* to reduce the capital stock of the company and *to distribute* to its shareholders the shares of stock of said railway companies now held by it."

The precise question which was presented below was whether the decree in the Government suit was sufficient to sustain the complainants' *prima facie* case on a motion for a preliminary injunction. The subject-matter of the litigation, the railway shares, was the same. The present controversy was the result of the decree in that suit. The effect of the decree was to create the present situation. The defendant was professing to *comply* with that decree, and was asserting that the abandonment of the whole enterprise was rendered *necessary* by that decree. The issues tendered by the

bill of complaint in both cases were in many respects the same. And the present complainants, as stockholders of the Securities Company and as *cestuis que trustent*, were identified in interest with it in the Government suit. As stockholders, they were not strangers to a litigation which involved the right of the corporation to carry out the objects for which it was organized and which affected the title to all its property and sources of income. As depositors, they would be represented by their custodian, agent, or trustee as to its right to hold and the legality of its custodianship. The rule is elementary that all identified in interest and in privity with one of the litigating parties are concluded by a judgment and entitled to invoke its effect. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396. Even if the decision in the Government suit were not *res adjudicata* in the strict technical sense, it undoubtedly should have been regarded as a judicial precedent on the same facts sufficient to establish *prima facie* all that the complainants were called upon to show on the motion for a preliminary injunction. *Brill* v. *Peckham Motor Truck Co.*, 189 U. S. 57, 59–63; *American Bell Telephone Co.* v. *National Imp. Telephone Co.*, 27 Fed. Rep. 663, 664; *Kerr* v. *City of New Orleans*, 126 Fed. Rep. 920, 924.

It is well settled that a stockholder is so far an integral part of the corporation that he is considered privy to any legal proceedings touching its status and powers. His stock may not be fully paid-up, but nevertheless he is a stockholder so long as he stands registered as such on the books of the company. The real parties in

interest behind the corporations are always the stockholders. Thus, if a corporation has been adjudged insolvent in legal proceedings, this adjudication of its status is binding upon every stockholder, for reasons quite applicable to the question now being considered. In *Sanger* v. *Upton, Assignee*, 91 U. S. 56, 59, Mr. Justice Swayne, delivering the opinion of the court, said:

> "As a stockholder, she was an integral part of the corporation. In the view of the law, she was before the court in all the proceedings touching the body of which she was a member. In point of fact, stockholders in such cases can hardly be ignorant of the measures taken to reach the effects of the corporation. If they choose to rest supine until cases against them like this are on trial, they must take the consequences. Not having spoken before, they cannot be permitted to speak then, especially to make an objection which looks rather to the embarrassment and delay than to the right and justice of the case. A different rule would be pregnant with mischief and confusion. *Hall* v. *U. S. Ins. Co.*, 5 Gill, 484; *Sagory* v. *Dubois*, 3 Sandf. Ch. 510."

See, also, *Hawkins* v. *Glenn*, 131 U. S. 319, 329; *Glenn* v. *Liggett*, 135 U. S. 533, 544; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 337; 3 Cook on Corporations, Fifth ed., sec. 750; Herman on Estoppel and Res Judicata, 154, 165; *Hale* v. *Hardon*, 95 Fed. Rep. 747, 759; *Hendrickson* v. *Bradley*, 85 Fed. Rep. 516; *Wilson* v. *Seymour*, 76 Fed. Rep. 678, 681; *National Foundry & Pipe Works* v. *Oconto Water Co.*, 68 Fed. Rep. 1006, 1007; *Secor* v. *Singleton*, 41 Fed. Rep. 725.

Moreover, the Securities Company, as a custodian or

trustee of the railway shares deposited with it, represented the complainant Oregon Short Line Company as one of the *cestuis que trustent*. It is a familiar rule that in suits respecting trust property, all the *cestuis que trustent* are fully represented by the trustee and bound by the decree. The reason is that, through the trustee, their rights are deemed to have been fully and effectually presented and protected.

As this court said, speaking through Mr. Chief Justice Waite in *Kerrison, Assignee*, v. *Stewart*, 93 U. S. 155, 160:

> "In such cases, the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party."

See also *Graham* v. *Boston, Hartford & Erie R. R. Co.*, 118 U. S. 161, 179; *McCampbell* v. *Mason*, 151 Illinois, 500, 508, and *McElrath* v. *Pittsburg and Steubenville Railroad Co.*, 68 Pa. St. 37, 40–41.

But aside from the settled doctrine that a corporation in such a suit represents its stockholders or constituent members and that when it is bound as to a matter affecting its status or condition or powers, they are bound, and aside also from the view that the company was a trustee for the railway stockholders, the Government in its bill of complaint expressly nominated the defendants Morgan, Bacon, Baker and Lamont as representatives of the class to which the complainant Oregon Short Line Railroad Company belongs, namely, those original holders of Northern Pacific stock who

became parties to the illegal combination (transcript, p. 81; 193 U. S. 202).

The procedure of the Government in thus naming part of the class to represent and bind the whole was based upon the settled practice in equity recognized by this court in the case of *Smith* v. *Swormstedt*, 16 How. 288, 303, where Mr. Justice Nelson, among other things, said:

> "In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried. Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interests of all will be properly protected and maintained."

It is well settled that the extent and effect of the decision of any court, as *res adjudicata* or as a judicial precedent, must be ascertained, not merely from the decree or mandate, but also from the pleadings and the opinions delivered by the court. It is likewise proper to refer to the arguments of counsel when-

ever necessary in order to determine exactly what points the court has ruled upon. The long-settled rule is that every question directly presented by the issues and discussed and passed upon in the opinions is as much a part of the decision and judgment of the court as if it had been expressly recited in its decree or mandate. So, the mandate of this court is always to be read in the light of its opinion, and it has never been the practice to recite in the mandate any of the points decided, but simply to declare the ultimate conclusion of affirmance, reversal, dismissal, or qualification of the decree below. *Last Chance Min. Co.* v. *Tyler Min. Co.*, 157 U. S. 683, 690; *In re Sanford Fork and Tool Co., Petitioner*, 160 U. S. 247, 256; *In re Potts, Petitioner*, 166 U. S. 263, 265; *Baker* v. *Cummings*, 181 U. S. 117, 126; *National Foundry Co.* v. *Oconto Water Supply Co.*, 183 U. S. 216, 234.

And, as Mr. Justice Harlan said in the Government suit in reference to propositions concluded by prior decisions of the court under the Sherman Anti-trust Act (193 U. S. 332):

> "They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties."

See also *Railroad Company* v. *Schutte*, 103 U. S. 118, 143.

In the case at bar, notwithstanding the fact that the decree on its face adjudged that *all* of the stock of the Northern Pacific and Great Northern Railway Companies *claimed* to be *owned* and held by the

Securities Company was acquired and was held by virtue of an unlawful combination or conspiracy in violation of an act of Congress (pp. 190–191), it has now been held, as the petition fully shows, that the Northern Pacific stock delivered to the Securities Company by the complainants Harriman and Pierce was acquired and is held under an unconditional and valid contract of purchase and sale. And, for the very purpose of establishing this fact, directly contradicting the decree in the Government suit, the Northern Securities Company submitted to the court below extracts from the testimony in that suit and repeated below the arguments addressed to this court in the prior suit, as is fully shown in the petition filed herewith, and the statement need not be here repeated.

The inquiry is not whether this court could have disposed of the Government suit without ruling upon any other questions than those expressly found or disposed of in the decree of the Circuit Court of Minnesota. Obviously, there could have been a decision affirming without opinion or upon the opinion of the court below, and the court could thus have avoided the express *decision* of any other issue or question involved in the case. But the court did not see fit to adopt that course. It proceeded to consider, discuss and pass upon a number of questions not specifically mentioned in the decree or opinion of the court below although *involved in its ultimate decision*. The inquiry, therefore, is whether the parts of the opinion now challenged as *obiter dicta*, and consequently to be disregarded, were or were not beyond and outside of

the case—were or were not within the issues submitted for decision—were or were not properly presented, fully argued and actually decided. If those parts of the opinion ruled upon material questions within the issues, properly presented and fully argued, they are as conclusive and binding as if the findings were expressly recited in the decree. *Railroad Company* v. *Schutte*, 103 U. S. 118, 143. The petition for a writ of certiorari (pp. 13–40) fully sets forth and shows that the question of ownership and custody was then in issue, was fully argued, and was expressly passed upon by this court.

V.

As to the complainants' right to recover.

The Northern Securities Company was indisputably organized for the purpose of carrying into effect the illegal combination entered into by Messrs. Hill and associates, and the Northern Pacific stock involved in the case at bar is held solely by virtue of such illegal combination, in violation of an act of Congress. The purposes and undertakings of the Securities Company, as the instrument of this illegal combination, were still executory when the decree in the Government suit was rendered, and the directors have now determined to abandon the enterprise and to "fully and unreservedly and without delay" comply with the decree in the Government suit (pp. 11, 193), and the company "contemplates a speedy dissolution" (p. 202).

Stated in its final analysis, the case is one where property is held under and by virtue of an illegal con-

tract in violation of an act of Congress, which the parties entered into in the "full belief" that they were not transgressing the law (record, p. 5), where the end, object and purpose of the contract cannot be continued and the enterprise must be abandoned, and is being abandoned, and where the consideration for the transfer —based upon the assumed power and authority of the corporation to permanently hold—has utterly failed.

Under such circumstances, has the vendor the right to disaffirm the illegal contract and demand the return of his property; or may the corporation treat the illegal contract as valid for the purpose of securing absolute ownership in itself and thus enable it to dispose of the property and enjoy the fruits of the transaction, as fully as if the contract had been lawful and valid and the acquisition and continued holding of the property were not in violation of law, and as if the consideration of the contract had not failed?

In the decree in the Government suit, the court dealt with all the consequences of the illegal contract and expressly authorized the *return* and transfer "*to the stockholders* of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively," of "any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore *received from such stockholders in exchange* for its own stock."[1] The court did not authorize any division *pro rata*, but the return to the stockholders of the railway companies (including necessarily the complainants) of the same railroad stocks "*received*

[1] Record, p. 191.

from such stockholders." The courts had all the facts before them, and the express permission or sanction in the decree is a part of the adjudication by both courts. Permissive in its language, this provision of the decree was nevertheless the *judicial* action of the courts and not a *brutum fulmen* signifying nothing. Both courts evidently deemed it necessary to make some provision upon the subject. It is submitted that the effect of this provision of the decree was to eliminate from controversy in the present suit the contention on the part of the Securities Company that the complainants were not entitled to the return of the stock *received* from them by the Securities Company, "*in exchange* for its own stock," provided such return was practicable, as the petitioners averred and sought to prove.

The general rule governing cases, where the purpose and consideration of a contract have failed by reason of illegality resulting in corporate disability to perform, is stated by Mr. Justice Matthews, speaking for the Supreme Court, in *Chapman* v. *County of Douglas*, 107 U. S. 348, 355, as follows:

> "As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *Marsh* v. *Fulton County*, 10 Wall. 676, 684, and repeated in *Louisiana* v. *Wood*, 102 U. S. 294, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel

restitution or compensation.' See also *Miltenberger* v. *Cooke*, 18 Wall. 421."

It ought not to be necessary to argue that the present suit is in no sense whatever an action *on* an illegal contract or to enforce an illegal agreement. On the contrary, it is brought on the repudiation thereof by both parties. As Mr. Justice Holmes said, speaking for the court in the recent case of *National Bank & Loan Co.* v. *Petrie*, 189 U. S. 423, 425:

> "Cases where the action is on the illegal contract do not apply. . . . Here the attempt is to recover outside of it, treating it as set aside. . . . But when a right is claimed to repudiate it, the party who denies the right is the one who relies upon the contract."

In contemplation of law, the original contract, being for an illegal purpose, could not confer rights of ownership; and the corporation had no legal right or power to make any such acquisition for the illegal purposes. The whole transaction was illegal and *ultra vires*. The agreement actually entered into having failed because of illegality and lack of corporate authority, the only contract in the case is the one implied by law to return property transferred by virtue of a contract entered into under a mutual mistake of law for a purpose which has wholly failed and is being abandoned. The law implies that when property is transferred for a purpose which has been terminated, prevented or abandoned, the holder will return the property on demand. It is that implied contract which the complainants seek to enforce, and by virtue of which they seek to recover their property. It is the defendant

Securities Company which, by denying the right to reclaim the property and refusing to return it, is now relying upon the illegal contract and seeking to obtain a benefit thereunder and thus *pro tanto* to give it force and effect.

As Chief Justice Waite said in *Louisiana* v. *Wood*, 102 U. S. 294, 299:

> "The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other."

If, in such a case, the courts were to refuse to permit a restoration of the *status quo*, obviously they would be giving sanction and continued effect to the illegal contract. As Mr. Justice Blatchford said in *Parkersburg* v. *Brown*, 106 U. S. 487, 503:

> "*To deny a remedy to reclaim it, is to give effect to the illegal contract.*"

See also *Davis* v. *Old Colony Railroad*, 131 Massachusetts, 258, 275; *White* v. *Franklin Bank*, 22 Pick. (Mass.), 181, 185–186; *La Caussade* v. *White*, 7 D. & E. 535.

No precedents in support of the right to recover could be stronger than the series of decisions in the long controversy between the Pullman Palace Car Company and the Central Transportation Company, where, although the contract was illegal and the parties *in pari delicto*, return of the property delivered under an illegal

lease or its value, was ultimately decreed (139 U. S. 24; 65 Fed. Rep. 158; 171 U. S. 138).

The Securities Company, however, contended below that the avowed and conceded illegality of the acquisition of the railroad stocks precluded recovery in the case at bar, and, in effect, that it might retain all the railroad stocks without accountability to any party who was privy to the illegal contract. The case of *St. Louis Railroad* v. *Terre Haute Railroad*, 145 U. S. 393, was cited and relied on as a controlling authority in support of this proposition. The perusal of the opinion in that case will show that the lessee had duly paid rent from time to time for seventeen years and that it was continuing to perform all its obligations under the lease. The lessee had not abandoned or refused to perform the illegal lease, which was for the term of 999 years. The illegality had not been terminated, either voluntarily by abandonment, or involuntarily in obedience to a decree of court. Differentiating the case from such as the case at bar, this court in its opinion distinctly recognized the right to recover upon the abandonment of an unlawful contract and the termination of its illegal purpose. Thus at page 409, Mr. Justice Gray said:

> "This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *Logan County Bank* vs. *Townsend*, 139 U. S. 67, and cases there cited."

There is nothing in the *Terre Haute* case as authority for the proposition that, upon the abandonment or

termination of an illegal contract,—in that case an illegal lease—the owner of the property was not entitled to its return and could not sue for its recovery. Had the term of the lease in that case expired, or had it been terminated or abandoned, or had the lessee refused to perform, there can be no doubt that the right of the lessor to recover the leased property would have been recognized, as in the *Pullman* cases.

The defense that a lessee could retain the leased property by pleading illegality, after the illegal lease had come to an end on the expiration of the time fixed by the parties, was interposed in the case of *Sittel* v. *Wright*, 122 Fed. Rep. 434, 435, but Sanborn, C. J., speaking for the Circuit Court of Appeals, Eighth Circuit, used the following language:

> "The third paragraph of the defendants' answer, in addition to the allegation that the lease was in violation of the laws of the Indian Territory, alleges the lease was made by an agent of the Choctaw Coal & Railway Company without its authority, and from that fact deduces the extraordinary conclusion that the corporation, or its assignees or lessees, have acquired good right to keep the plaintiff's property. SUCH A DEFENSE DOES NOT MERIT SERIOUS CONSIDERATION."

The same question arose in the case of *Manchester, etc., R. R. Co.* v. *Concord R. R. Co.*, 66 N. H. 100. The plaintiff and defendant railroad companies operated competing lines, and entered into a contract whereby the defendant acquired and operated the properties of the plaintiff together with its own property as one line in violation of an anti-monopoly statute of the state of New Hampshire. The term of the contract having expired, the plaintiff instituted

a suit in equity against the defendant for a return of its properties, for an accounting of the proceeds of the use thereof, and for the determination and adjustment of the respective rights of the parties (similar in this respect to the *Pullman* cases, *supra*). The defendant pleaded in bar the illegality of the transaction under which the property of the plaintiff had been held and operated by it. The plaintiff demurred to this plea, and the demurrer was sustained. The court, by Blodgett, J., after holding that the contract was prohibited and void and no right of action could be founded upon it, said (p. 131):

> "Nevertheless, we do not think the defendants are entitled to retain the money or other property so acquired, and for which they have rendered no corresponding equivalent to the plaintiffs in return, but on the contrary, we are of opinion that it is their duty to make equitable compensation and restitution, and that the duty may be enforced in this proceeding."

And again (p. 133):

> "Whatever the legislature may have intended to accomplish by the anti-monopoly act of 1867, there is no reason to suppose their intention was to reward the Concord Railroad for its violation. And however it may once have been, it is certainly now difficult to see how public policy is subserved by allowing the addition of a private wrong to a public wrong, which necessarily results when, without any equivalent in return, one party to an executed illegal transaction excludes the other from participating in the proceeds; and we entirely fail to appreciate the morality which denies in such cases any rights to the party whose money or other property has been thus appropriated by his associates, contrary to express agreement and every principle of fair dealing, and which in conscience the benefited party cannot retain.'"

This New Hampshire case was cited among others by this court in *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 151, in support of the proposition that—

> "The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it."

It is submitted that, in the nature of things, there is no difference in principle between the termination of an illegal contract by its own limitation and the termination by judicial decree or by repudiation or compulsory abandonment. The essential thing is that the illegality has come to an end.

The Northern Securities Company, it is true, contends that it has not abandoned or terminated or refused to perform the illegal contract and that, therefore, the case does not fall within the exception recognized by Mr. Justice Gray in the *Terre Haute* case. But it is difficult to perceive any merit in this contention in view of the proofs, which establish beyond question that the Securities Company was organized as a *holding* company to *permanently* hold the railroad stocks, that concededly it cannot continue so to do, and that it is about to "divest" itself of the same, and that it "contemplates a speedy dissolution."

The proposed plan of distribution is incontestably an abandonment of the illegal combination. The Securities Company reduces its capital stock exactly to the extent necessary to "divest itself" of all the shares of stock of the railway companies acquired and held by virtue of the illegal contract. It declares its purpose to speedily dissolve because of the decree in the Govern-

ment suit. It proposes to call in and cancel every certificate outstanding which in any way represents its holdings of railway shares and to retain only the assets which were in no way involved in the Government suit. A more complete abandonment or repudiation of the illegal combination and holding and of the purpose for which the stock was transferred cannot be conceived.

What did the directors really mean when they adopted the resolution of March 22, 1904, if they were not about to abandon and terminate the illegal combination? Let us read the resolution they adopted (p. 11):

> "Whereas, This company desires and intends to comply with the decree in the said suit fully and unreservedly, and without delay; . . .
>
> "Resolved, In consideration of the premises it is declared *necessary* and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railway companies held by it."

And their circular to the stockholders was to the same effect (p. 193):

> "Therefore, your Directors at a meeting held this day have, under advice of counsel, decided that in order to fully and promptly comply with the decree in this suit, it is necessary to reduce the capital stock of the company and to distribute to its shareholders the shares of stock of said railway companies now held by it."

What did Mr. Hill, as president of the Securities Company, mean by his letter to the Attorney-General if the company did not intend to abandon the illegal combination? His language was as follows (p. 202):

> "The decree of the Circuit Court of Minnesota having been affirmed by the Supreme Court of the

United States, the Northern Securities Company, without question or delay, will comply therewith. In order that there may be no room for misleading or untruthful reports, we deem it advisable to state to you this fact. The Company contemplates a speedy dissolution; but it is deemed by the Directors unwise to bring this about, until after it has divested itself of the shares of the Northern Pacific and Great Northern Railway Companies' stock by a distribution of the same, ratably, amongst the stockholders.

"I enclose a copy of the resolutions which have been passed by the Board. Without delay, after the stockholders have acted, the capital stock will be so reduced as to permit a distribution of the railway shares amongst the stockholders of the Northern Securities Company in the only way feasible, in the judgment of the Board. The method of distribution proposed by the Board of Directors will accomplish the purpose of the Government, and will preserve the equitable rights of all the stockholders as amongst themselves."

It is submitted as almost preposterous to expect any court to hold, on this showing, that the Northern Securities Company is not about to abandon and terminate the illegal purpose in consummation of which the complainants' stock was held and that it has not practically refused further to continue the unlawful combination. As it is about to abandon and terminate the illegal contract by which it acquired and held the railroad stock, the authorities which permit recovery on the termination or abandonment of such a contract are clearly in point.

VI.

General rule as to illegal contracts of corporations.

The subject of the effect of illegal contracts of corporations, either *ultra vires* in the proper sense or con-

trary to statute or public policy, has been frequently considered by this court. The settled rule is that such a contract is wholly void and of no effect for any purpose, that the objection is not merely that the corporation ought not to have made it, but that it could not make it, that the contract cannot be ratified or confirmed by the stockholders, because it could not have been authorized by them, and that no performance can give the unlawful contract any validity by way of estoppel or otherwise, or be the foundation of any right. Such have been the unvarying rulings of the court from 1879 to the present time. *Thomas* v. *Railroad Co.*, 101 U. S. 71, 86; *Penn. Co.* v. *St. Louis, Alton, etc., Railroad Co.*, 118 U. S. 290, 310; *Oregon Railway Co.* v. *Oregonian R'y Co.*, 130 U. S. 1, 38; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60; *McCormick* v. *Market Bank*, 165 U. S. 538, 550; *California Bank* v. *Kennedy*, 167 U. S. 362, 368; *Pullman Co.* v. *Transportation Co.*, 171 U. S. 138.

It is also the settled doctrine of this court that any contract made in violation of a statute is void (*Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 410; *Miller* v. *Ammon*, 145 U. S. 421, 426), and that "it is vain to contend that any right can be acquired under such a contract" (*Montgomery* v. *United States*, 15 Wall. 395, 399). To same effect see *Desmare* v. *United States*, 93 U. S. 605, 612; *Sprott* v. *United States*, 20 Wall. 459, 461; *United States* v. *Lapène*, 17 Wall. 601, 602, 603; *United States* v. *Grossmayer*, 9 Wall. 72, 76; *The Ouchita Cotton*, 6 Wall. 521, 532.

Speaking of an *ultra vires* contract, Mr. Justice

Miller in the *Pennsylvania Co.* case, *supra*, used the following language (118 U. S. 317):

> "But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it."

And this language has been repeatedly cited with approval, *e. g.*, in *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, at p. 61. See also *Jacksonville, &c., Railway* v. *Hooper*, 160 U. S. 514, at p. 524. In the *Central Transportation Co.* case, the court by Mr. Justice Gray said (139 U. S. 59, 60):

> "A contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

In *Dwight* v. *Brewster*, 1 Pick. 50, 55, Chief Justice Parker said:

> "The principle settled is that a party to an unlawful contract shall not receive the aid of the law to enforce that contract or to compensate him for the breach of it. It is not easy, however, to discern how a party to such contract who becomes possessed of the property of the other party with which he is to do something which the law prohibits can acquire a right to that property. *A contract being void, the property is not changed, if it remains in the hands of him to whom it is committed.*"

This general rule has been applied or recognized in analogous cases arising out of illegal contracts affecting illegal combinations or trusts. Thus, in *Langdon* v. *Branch*, 37 Fed. Rep. 449, 463, District Judge Speer, discussing the attempt of a railroad corporation to acquire stock in another company in violation of a state constitution, said:

> "Contracts in violation of this clause are not permitted. When attempted they are utterly void. They have no binding force. They are nullities, and are to be disregarded and ignored whenever it concerns a party at interest to do so. . . . *Such a contract would be absolutely void, and, being void, and an absolute nullity, no title would pass under it.*"

In *State ex rel.* v. *Standard Oil Company*, 49 Ohio St. 137, 183, the Standard Oil Company of Ohio, which had become a party to an agreement to have its stock transferred to trustees for the purpose of effectuating an illegal combination, was ousted of its corporate power to fulfill the agreement. Discussing the nature of the transaction under which the stock had been delivered in exchange for trust certificates, the Supreme Court of Ohio said:

> "In other words, it is to be managed in the interest of the Standard Oil Trust, whose principal place of business is in New York City, irrespective of what might be its duties to the people of this state, from which it derives its corporate life; and its real stockholders receive their dividends from the profits of that trust, and not from the earnings of their company; *for the holders of the trust certificates, received in exchange for their stock transferred to the trustees, remain in law and in equity the real owners of the stock so transferred;* and the averment in the answer that the dividends of the company are paid to the holders of its stock, appearing as

such on its stock-books, is immaterial; since these persons are not the owners, but the trustees of the stock."

And again in conclusion (p. 189):

"And in this connection, it is proper to say, that, in the judgment of the court, if the company through its directors, or otherwise, should hereafter recognize the transfers of the shares that have been made on its stock-books to the trustees provided for in the trust agreement, or should hereafter make such transfers; or should pay dividends to them instead of to the real owners of the shares; or should permit such trustees to vote on shares so held by them in the election of its directors, in every such case, it must be regarded and held, as performing the agreement in violation of the judgment of this court."

In *People* v. *Chicago Gas Trust Company*, 130 Illinois, 268, it appeared that the defendant company was organized under the General Incorporation Act of the state of Illinois, which permitted the organization of a corporation "for any lawful purpose." In the certificate of incorporation, the company had stated that one of its objects was "to purchase and hold or sell the capital stock" of any gas or electric company or companies in Chicago or elsewhere in Illinois. It was held that the incorporation was not for a lawful purpose and that all acts done by it toward the accomplishment of such purpose were illegal and void. Magruder, J., said (p. 292):

"The purpose for which a corporation is formed under the act must be a lawful purpose. So far as appellee was organized with the object of purchasing and holding all the shares of the capital stock of any gas company in Chicago or Illinois it was not organized for a lawful purpose, and *all acts done by it toward the accomplishment of such object are illegal and void.*"

In *People* v. *North River Sugar Refining Co.*, 121 N. Y. 582, an illegal combination of several corporations had been effected by the stockholders in form selling their stock to a joint stock association for its share certificates, and the franchise of one of the corporations to exist as such was forfeited for participation in the illegal combination. Such participation consisted in registering the transfer of shares on the corporate books in the names of trustees of the association and in recognizing them as the owners of the stock. Judging the transaction by its real purpose, the court held (p. 611)—

> "that the corporate stockholders parted with the legal title to their stock to the chosen trustees with the power to vote upon it, but retained, nevertheless, its beneficial ownership through the operation of the certificates."

And the court, per Finch, J., said (p. 614):

> "The board organized by the refineries had a nominal capital of fifty millions, but not a single dollar of actual capital beyond the corporate shares transferred; and so the sellers, if indeed they were such, got aliquot parts of their own property in payment for the transfer. If they sold it, they simply got it back under a new name."

And again, meeting the contention that the corporation was bound to recognize the illegal ownership under the sham transfers (p. 620):

> "The answer is that they could have refused to recognize the illegal trust transfer of the stock; they could have declined to register the new ownership upon their stock books; they could have said, and acted upon their words, that *the original stockholders remain not only the beneficial, but the legal owners of the stock;* and, if the board of trus-

tees appealed to the law, the resisting directors could challenge the legality of the transfer as moulded by the combination agreement, and might have defeated the trust and shattered it at the outset of its career."

In *Cameron* v. *Havemeyer*, 25 Abb. N. C. 438, 446, in considering the situation of the parties composing the Sugar Trust after the decision of the Court of Appeals and pending a reorganization, Pratt, J., said (p. 446):

"Now, a most serious question arises, whether or not they have any title, or are anything more than mere custodians of property which belongs to others, to wit, the certificate holders.

"At the present time, I think, they are mere custodians. If any argument is required to establish this proposition, it will be found in the history of the organization of the Sugar Trust."

And again (p. 447):

"We therefore find the defendants in possession of property belonging equitably to others, which came into their hands under an agreement void as to the main purpose for which it was made, and which they cannot legally use for the purposes for which it was placed in their hands; and they are utterly powerless to convey and give a good title or to distribute it to its rightful owners."

In the subsequent case of *Unckles* v. *Colgate*, 148 N. Y. 529, 536, one who had bought trust certificates sued to enforce a claim of right founded thereon and to recover his share of the assets. The court refused to sustain the action as wholly based upon and arising from an illegal transaction; but it distinguished the case before it from one brought by an original depositor in disaffirmance of an illegal agreement and seeking

a restoration of property conveyed and held thereunder.

In *State* v. *Distilling Co.*, 29 Nebraska, 700, there was an information in the nature of a *quo warranto* to oust the Nebraska Distilling Company of its franchise to exist as a corporation because of its having entered into an illegal combination. It had conveyed all its property to a trustee from whom it took a lease for twenty-five years. The stock of the corporation had also been conveyed to trustees, who elected its board of directors and controlled its management, its stockholders receiving trust certificates. A stockholder who had participated in the illegal transaction was permitted to intervene. The court said (p. 719):

> "Any contract entered into with such an object in view is, under the laws of this state, null and void, and the conveyance from the Distilling Company to the trust was in contravention of the authority conferred by the statutes on that company, in excess of the powers granted by its charter, and against public policy and void, *and no title passed by such conveyance.*"

It is, therefore, respectfully submitted that this court and the Circuit Court of Minnesota, in the Government suit, undoubtedly contemplated, in accordance with the well settled rule of law, that the necessary effect of an adjudication that the stock "claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it" in violation of law, coupled with authority to return it to original depositors (p. 191), was that the contract was void for all purposes, that the absolute ownership of the railroad stocks did not pass to the Securities Company but remained in the depositors or their assigns as bene-

ficial and equitable owners, and hence that it could authorize the return of the stocks to such owners,

The cases holding that a *bona fide* purchaser may acquire a good title from one holding possession under an illegal contract are distinguishable, because in such cases the doctrine of estoppel operates to prevent the real owner from asserting *his* title or the right of the custodian as his agent against the innocent third party, and not to affirm any title in the one having such illegal possession. *Cowdrey* v. *Vandenburgh*, 101 U. S. 572, 575, 576; *Anderson* v. *Armstead*, 69 Illinois, 452, 454, 455.

VII.

As to the defense of *in pari delicto*.

The effect of the contention of the defendant Northern Securities Company in the courts below was that because it now holds possession by virtue of an illegal combination among parties *in pari delicto*, the complainants and all other depositors forfeited their property, lost all their legal rights, and could be allowed no standing in any court of law or equity to reclaim their property, and that it might distribute it at will. The defense was advanced in the face of the conceded and indisputable fact that the complainants Harriman and Pierce, who are thus to be outlawed, and the immense property interests represented by them to be forfeited, were not parties to the original combination in pursuance of which the Securities Company was organized (pp. 3, 5, 199), that it was entered into in hostility and antagonism to their interests (pp. 199–201), and that

they acted in good faith and in the full belief that the transaction was legal and that the company had legal power to acquire and hold the railroad stocks for the purposes mentioned (p. 5).

Of course, the Securities Company realized that this argument, in its final analysis, would permit it to retain the railroad stocks in perpetuity free from any accounting to the holders of its certificates, and also enable it, or rather its officers and directors in actual possession of the certificates for the railroad stocks, to secure an unconscionable advantage. It appreciated that the courts had "often stated in similar cases that the defense is a very dishonest one and it lies ill in the mouth of the defendant to allege it."[1] And it, therefore, sought by much euphemism to minimize the character of the plea. In exculpation, the suggestion seemed to be that the defense should be tolerated because the directors did not intend to retain the property for themselves but proposed to distribute it according to their own ideas of law and equity. We may now consider whether any such plea can defeat the complainants' legal rights.

A.

As to good faith and innocent intent.

The allegation of the bill that the complainants Harriman and Pierce, in exchanging the Northern Pacific stock in question for certificates representing shares in the Securities Company, acted "in good faith in the belief that the organization of said Securities Company

[1] *McMullen* v. *Hoffman*, 174 U. S. 639, 669.

was not and the acquisition and holding by it of said railway stocks, as aforesaid, would not be in violation of any statute of the United States" (record, p. 5), was admitted. Indeed, it was indisputable. In the circular of March 22, 1904, issued by the officers and directors of the Securities Company immediately after the decision of this court, it was among other things publicly declared that (p. 193):

> "The Company's acquisition of Northern Pacific and Great Northern shares was made *in the full belief that such purchases were in no wise obnoxious to any law of the United States*—an opinion which has received the approval of four Justices of the Supreme Court of the United States, namely, Mr. Chief Justice Fuller, and Associate Justices Edward D. White, Rufus W. Peckham and Oliver Wendell Holmes, in the suit brought by the United States against the right of the Company to hold and vote the shares."

And in the reply brief submitted to the Circuit Court, on behalf of the Securities Company, the following concession was made (p. 3):

> "*There is and can be no doubt that all parties believed that they were doing nothing contrary to law*, and in this particular the complainants are in no better condition than the other organizers of the Securities Company."

The case is, therefore, concededly one where parties acting in good faith transfer property for a purpose which they fully believe to be legal, but which is subsequently adjudged to be illegal. Under such circumstances, where the illegal purpose cannot be continued and must necessarily be abandoned, is it the law that the innocent owner of property so transferred has forfeited his legal rights, that he has become outlawed,

that he cannot maintain an action to recover his property, that the other party may retain the property free from accountability and convert it to his own use or dispose of it as he sees fit, and that the one in possession is protected by a rule of public policy and a maxim of equity?

As Mr. Justice Holmes said in *National Bank & Loan Co.* v. *Petrie*, 189 U. S. 423, 425:

> "A person does not become an outlaw and lose all rights by doing an illegal act."

Now, in the case at bar, it is manifest from the present record that all parties acted upon the assumption that the Northern Securities Company could lawfully acquire and permanently hold the stocks of the railway companies; that the point of law was unsettled and doubtful; that there was no illegal or criminal intent by Harriman and Pierce; that there was no consciously wrongful act—no *mens rea*, and that at most there was a mistake as to the application and interpretation of a doubtful statute, the full effect of which had not yet been determined.

The mutual mistake of law in the case at bar is not only admitted, but was one which reasonable men might well make. The language of the statute was most general; its scope and meaning were admittedly uncertain; it was a new experiment in federal legislation of doubtful constitutionality; until interpreted by the courts, no one, even though skilled in the law, could venture to assert with any degree of confidence what was or was not within the scope of the law. A penal statute was passed by Congress in uncertain

and vague language, so that most men could not discern what was intended to be prohibited by its general language. Indeed, it was deliberately contemplated by the Congress itself that the effect of the legislation would remain uncertain until authoritatively construed by the courts. In the final debate in the House of Representatives, after the passage of the bill by the Senate, Mr. Culberson of the Judiciary Committee, who had special charge of the bill on its behalf, among other things said (Congressional Record, 51st. Cong., 1st. sess.; vol. 21, pt. 5, p. 4089):

> "Now, just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of the trade or commerce mentioned in the bill, *will not be known until the courts have construed and interpreted this provision.* . . . I wish to be understood, Mr. Speaker, as having stated at the outset that I do not know, *nor can any man know*, just what contracts will be embraced by this section [section 1] of the bill until the courts determine."

To avoid misapprehension, it should be observed that the petitioners are not contending that good faith, innocence of intention to violate a statute, or ignorance of the existence of a statute or its effect, would constitute a defense to any proceeding to enforce the penalty prescribed or the *preventive* remedy provided in the statute. The contention is that when relief is sought from a contract entered into through a mutual mistake as to the application of an admittedly doubtful statute, *which contract is being abandoned*, a different question and different considerations are presented. In such a case, the court is not called upon to enforce any penalty prescribed by the statute. The lawgivers

only provided for a fine and imprisonment of not more than one year and preventive relief in equity (act of Congress of July 2, 1890; 26 Stat. 209). An infraction of its provisions was not made an infamous crime (*Ansbro* v. *United States*, 159 U. S. 695, 696, 697). Although Congress specifically dealt with the subject of forfeiture of property, it limited such forfeiture to property in transit from one state to another in pursuance of a violation of the statute (see § 6, 26 Stat. 210). The court is only now considering whether the circumstances of this particular case are such that a court of justice must superimpose upon the penalties prescribed by the statute the additional punishment of forfeiture of property interests and deny the complainants a hearing in court in face of the *admitted* fact that all parties acted in good faith and with no intention to violate or defy the law.

We conceive that if there be one fundamental distinction which more than any other courts of justice bear constantly in mind, it is the distinction between a deliberate transgression of the law and an unconscious transgression of the law—between harm voluntarily caused and harm involuntarily caused—between crime consciously committed and crime innocently committed—between an illegal act knowingly done and an illegal act done in ignorance of the law—between a flagrant violation of law and morality and an unintentional violation of a doubtful and uncertain statute. Men must, indeed, often be held responsible and punished for the effects and consequences of their innocent acts. Public policy

and the due administration and enforcement of the law may require it; and a clear expression of the legislative will to that end must be enforced. But no jurist has ever recommended in theory and no court has ever sanctioned in practice any rule which would punish a man who, it is *admitted*, acted innocently, in good faith and in the full belief that his acts were legal, as rigidly and harshly as if he had done an evil act knowingly, with deliberate malice, or in conscious or insolent disregard and defiance of the law.

Such a rule would be so obviously unjust that it would be a reproach to any system of government or of jurisprudence.

The rule as to parties *in pari delicto* obviously contemplates the existence of a *delictum*, that is, a wrongful act knowingly done, an intentional "transgression against positive law." It cannot be reasonably said that parties are *in pari delicto* when there is concededly no intentional wrongdoing or crime. Even in criminal cases, satisfactory proof of a mistake of the law, honestly held in consequence of a reasonable, but erroneous construction of a doubtful statute, often operates to mitigate the punishment and frequently to prevent conviction. See *Queen* v. *Tolson*, 23 Q. B. D. 168, 171–176; *Taylor* v. *Newman*, 4 Best & S. 89, 94; *Regina* v. *Allday*, 8 C. & P. 136, 139; *Rex* v. *Twose*, 14 Cox C. C. 327; *Regina* v. *Sleep*, 8 Cox C. C. 472, 478; *Regina* v. *Tinkler*, 1 F. & F. 513, 514; *Rider* v. *Wood*, 2 E. & E. 338, 343; *Buckmaster* v. *Reynolds*, 13 C. B. (N. S.) 62, 68; *United States* v. *Conner*, 3 McLean, 573, 574; *United States* v.

Fearce, 2 McLean, 14, 18; *Halstead* v. *State*, 41 N. J. L. 552, 591; *Cutter* v. *State*, 36 N. J. L. 125, 126 (cited approvingly in *Stone* v. *United States*, 167 U. S. 178, 188, and *Hedden* v. *Iselin*, 31 Fed. Rep. 266, 269); *State* v. *Sheeley*, 15 Iowa, 404, 407–408; *Commonwealth* v. *Bradford*, 9 Metc. (Mass.) 268, 272; *State* v. *House*, 71 N. C. 518, 520–521; *Dotson* v. *State*, 6 Coldw. (Tenn.) 545, 549.

It would be carrying the punishment beyond what any legislator would impose if it were now to be held that one party to a contract, which was subsequently held to be in violation of a statute, rendered himself not only liable to the punishment prescribed by the law-makers but in addition forfeited all his legal rights, however innocent he might have been of unlawful intent, and that the party in possession of property transferred under a mutual mistake of law, could retain it free from any accountability whatever, and thus enrich himself at the expense of an innocent man acting in good faith.

The question whether the rule applicable to parties *in pari delicto* applies where the parties acted in good faith and under a mutual mistake as to the law, has arisen in the federal courts in a number of cases, *e. g.*, *Spring Co.* v. *Knowlton*, 103 U. S. 49; *St. Louis Railroad* v. *Terre Haute Railroad*, 145 U. S. 393; *City of Detroit* v. *Detroit City Ry. Co.*, 60 Fed. Rep. 161, and *Pullman Palace Car Co.* v. *Central Transportation Co.*, 65 Fed. Rep. 158.

In *Spring Co.* v. *Knowlton* this court said (p. 60):

> "The law of New York does not in express terms forbid a corporation from issuing certificates for full-

paid stock when the stock has not been fully paid. The illegality of such an issue is deduced from several sections of the law under which the Congress and Empire Spring Company was organized, namely, sections 38, 40, 41 and 49. We think it is fairly inferable from the record that the trustees of the company, one of whom was Knowlton, did not know that the plan adopted by them for the increase of the stock was illegal, and that when they discovered that it was forbidden by law, and before any harm was done or could have been done, the scheme was abandoned. Under such circumstances, the rule which would prevent the recovery of the money paid to carry on the illegal plan would be a very harsh one, not founded on any law or public policy."

In *Pullman Palace Car Co.* v. *Central Transportation Co.*, 65 Fed. Rep. 158, affirmed 171 U. S. 138, the opinion of the Circuit Court for the Eastern District of Pennsylvania, delivered by District Judge Butler and concurred in by Circuit Judge Dallas, contains the following statement (p. 164):

"Thus it follows that unless the execution of the contract between the Central Transportation Company and the Pullman Palace Car Company involves moral turpitude as before described, the former may recover back the property parted with under it. That it does not involve such turpitude seems clear. Neither party contemplated any wrong. Both believed the contract to be lawful. The statute of 1870 was supposed to confer full authority to make it. The state had unquestionable power to grant the authority; and the evidence shows that the statute was procured for the express purpose of granting it. The question whether the statute did or did not grant it was a close and difficult one. The learned counsel of the parties and the court disagreed on the subject. It is a question of interpretation. In the court's view the lease was *ultra vires* and void; in the counsel's it was authorized

and lawful. True, it violated a rule of public policy, but this was only because the court construed the statute more narrowly than the legal advisers of the parties had done. The legislature is the judge of what the public interests require in the premises, and if it had authorized the lease, as the parties honestly believed it had, no question of public policy could have arisen. All that can justly be said, therefore, is that the parties misconstrued their authority, and that the lease is consequently *ultra vires*."

In *City of Detroit* v. *Detroit City Ry. Co.*, Circuit Judge Taft, discussing the principle as to parties *in pari delicto* and reviewing the *Terre Haute* case (145 U. S. 393), used the following language (60 Fed. Rep. 163):

"It might well have been added that the principle invoked by defendants has application only where a court of equity is asked to aid a wrongdoer, as, for example, one who has entered into, and partially or wholly executed, a contract which is *ultra vires* because its execution is an offense against the law, or a plain contravention of public policy (*Thomas* v. *Richmond*, 12 Wall. 349; *St Louis, V. & T. H. R. R. Co.* v. *Terre Haute & I. R. Co.*, 145 U. S. 393, 395; 12 Sup. Ct. 953), or one who has made and entered upon the execution of an *ultra vires* contract with the deliberate intention of evading the known limitations of the law (*Common Council* v. *Schlich*, 81 Mich. 405; 45 N. W. 994). It does not apply to a case like the present, where parties in entire good faith, with no intent to violate law or public policy, but by reason of a common mistake of law, make a contract, a stipulation of which is not binding to its full extent,—not because it is immoral or unlawful or against public policy, but simply for want of statutory power in the stipulating party. In such a case, to use the language of Mr. Justice Mathews, 'the policy of the law extends no further than merely to defeat what it does not permit, and imposes on the

parties no penalty' (*Chapman* v. *County of Douglas*, 107 U. S. 348, 356; 2 Sup. Ct. 62)."

The decree in this case was reversed on appeal (64 Fed. Rep. 628), but upon a ground which "did not affect the proposition here stated." *Louisville Trust Co.* v. *City of Cincinnati*, 73 Fed. Rep. 716, 732.

It is true that in *St. Louis Railroad* v. *Terre Haute Railroad* it was alleged "that at the time when the lease was executed by the plaintiff its officers supposed that it had lawful power to do so" (p. 397). In that case, however, whatever might be said as to the power of the plaintiff, there was not the slightest uncertainty about the statutes in so far as the defendant railroad company was concerned, and the effect of the enactments was manifest. The question as to the power of the plaintiff to lease its road was not decided, and consequently ignorance or mistake in regard thereto became immaterial, the court by Mr. Justice Gray saying (p. 404): "It is unnecessary, however, to express a definitive opinion upon the question whether the contract between these parties was beyond the corporate powers of the plaintiff." There was no reasonable basis for misapprehension or mistake as to the law affecting the defendant lessee. Mr. Justice Gray, therefore, stated (p. 404) that "the contract in question was *clearly* beyond the corporate powers of the defendant," and that the invalidity of the lease "was apparent on its face . . . of which the plaintiff was bound to take notice" (p. 408). And it was held that after seventeen years of operation under the lease and payment of the stipulated consideration from time

to time and as the lessee was continuing to pay and had "taken no steps to rescind or repudiate the contract" (p. 408), the assistance of a court of equity to set the lease aside ought not to be afforded. There was no question presented for decision as to the effect of a mutual and *admitted* mistake of law made by the parties in respect of a statute of uncertain meaning and scope, nor as to the right of a party to reclaim property parted with under a contract founded on such mistake which had failed of consideration by reason of its abandonment by the other party. As to such a case, Mr. Justice Gray qualified the decision by saying (at p. 409):

> "This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *Logan County Bank* v. *Townsend*, 139 U. S. 67, and cases there cited."

The court thus clearly recognized that even in that case, if the lessee had "abandoned or refused to perform the unlawful contract," a failure of consideration would have resulted and recovery would have been allowed, as in the subsequent *Pullman* case.

It is objected, however, to the right of recovery under these circumstances, that courts of equity are not warranted in granting relief from a mistake of law, because everybody is conclusively presumed to know the law. The general rule need not be challenged that a mere mistake of law, stripped of all other circumstances and considerations, will not alone afford a ground for relief,

but it has been established by innumerable decisions that relief will be granted from the consequences of a mistake of law, whenever the mutual mistake is clearly proved or *admitted* and by reason of such mistake, the party against whom relief is sought would otherwise secure an unfair advantage. Such is the doctrine of the English cases extending back to the time of Lord Mansfield. *Moses* v. *Macferlan*, 2 Burrows, 1005, 1012; *Farmer* v. *Arundel*, 2 W. Bl. 824, 825; *Bingham* v. *Bingham*, 1 Ves. Sen. 126; Belt's Supp. 79; *Bize* v. *Dickason*, 1 D. & E. 285, 286–287; *Earl of Beauchamp* v. *Winn*, L. R. 6 H. L. 223, 234; *In re Saxon Life Assur. Soc.*, 2 J. & H. 408, 412; *Jones* v. *Clifford*, L. R. 3 Ch. D. 779, 792; *Allcard* v. *Walker*, [1896] 2 Ch. 369, 381–382.

It is also established as the law in this country, and the right to relief from the consequences of a mistake of law under the principles above stated has been fully recognized by this court in *Griswold* v. *Hazard*, 141 U. S. 260, 284; *Spring Co.* v. *Knowlton*, 103 U. S. 49, 60; *Snell* v. *Insurance Co.*, 98 U. S. 85, 90–91; and *Hunt* v. *Rousmaniere*, 8 Wheat. 174, 215; 1 Peters, 1, 17. See also *State* v. *Paup*, 13 Arkansas, 129, 138; *Griffith* v. *Sebastian County*, 49 Arkansas, 24, 34, 36; *Northrop* v. *Graves*, 19 Connecticut, 548, 554, 560; *Stedwill* v. *Anderson*, 21 Connecticut, 139, 144; *Underwood* v. *Brockman*, 4 Dana, 309, 317; *Ray* v. *Bank of Kentucky*, 3 B. Mon. 510, 514; *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 102 Massachusetts, 45, 48; *Lowndes* v. *Chisholm*, 2 McCord Ch. (S. C.) 455, 461–462; *Morti-*

mer v. *Pritchard*, Bailey Eq. (S. C.) 505, 507; *Mackay* v. *Smith*, 27 Washington, 442.

B.

AS TO THE DISTINCTION BETWEEN *malum prohibitum* AND *malum in se.*

When an illegal contract is sought to be specifically enforced or when damages are claimed for its breach, undoubtedly the sound rule is that the difference between *malum prohibitum* and *malum in se* is immaterial. The idea that it was material has, in the language of Mr. Chief Justice Fuller in *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 412, "long since been exploded." The courts have refused, directly or indirectly, to recognize an unlawful contract or to give it validity and effect for any purpose. No rights can accrue from the doing of an act or agreeing to do an act prohibited by law whether or not that act be inherently moral or immoral. It is enough that the law forbids it. Obviously, any statute which prohibited acts not *mala in se* would be frequently circumvented and in many instances readily defied and nullified, if courts were at liberty to enforce contracts in violation of the prohibition because they considered the acts merely *mala prohibita.*

But the distinction between *malum prohibitum* and *malum in se* has been often recognized by the courts when considering the right to recover property transferred under an illegal contract, upon disaffirmance or termination of the illegal transaction, under circumstances which result in a failure of consideration. In such a case,

the duty of the courts, constantly exercised, is to inquire into the nature of the prohibited act. The object of this inquiry is to determine relative delinquency and whether the party suing is culpable or blameless—whether deserving of punishment or not—or, as it is termed in the homely language of the old maxim, whether he comes into court with clean hands. Where the transaction involves moral turpitude, such as the giving of a bribe, or facilitating the commission of an immoral act, or a heinous crime, the party is so clearly culpable and deserving of punishment that the courts will refuse to lend him any assistance against another party to the immoral transaction, but will leave both parties where their own immoral conduct has placed them. Where, however, the act involves no moral turpitude, but is merely *malum prohibitum* as distinguished from *malum in se*, relief has often been granted by restoring the *status quo* so far as practicable. In so doing, the illegal contract has not been sanctioned or enforced in any degree whatever; neither party has been allowed to profit or benefit from it; the court has simply restored property to its rightful owner and thus deprived the illegal contract of all force and effect. The fundamental difference between *malum prohibitum* and *malum in se* is distinctly recognized by this court in the recent case of *Union Stock Yards Co.* v. *Chicago, Burlington & Quincy R. R.*, decided January 5, 1905, as yet unreported.

In the case at bar, it is difficult to perceive how the defendant Securities Company can consistently urge that the transaction involved moral turpitude and was

therefore *malum in se*, in view of the conceded fact and its own declaration that the parties acted in good faith and in the *full belief* that they were not violating the law. The transaction clearly was not forbidden by the common law. *In re Greene*, 51 Fed. Rep. 104, 111; *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. D. 598, 619, 626–627; [1892] A. C. 25, 39, 43, 46–47, 51, 57; *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 334–335; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505, 572–573. It was also apparently legal according to the law of New Jersey where it occurred. New Jersey Corporation Act, revision of 1896, §§ 49, 51, Dill on Corp., pp. 88, 93; *Trenton Potteries Co.* v. *Oliphant*, 58 N. J. Eq. 507, 524–525. Except for the provisions of the anti-trust statute, there could have been no contention that the transaction was criminal in any sense, and the punishment provided by that act does not make a violation of its provisions an infamous crime (*Ansbro* v. *United States*, 159 U. S. 695, 697). Therefore, the transaction was at most merely *malum prohibitum*. A transaction which is merely *malum prohibitum* and entered into without any wrongful intention cannot involve moral turpitude.

The distinction between *malum prohibitum* and *malum in se*, when the action is brought to recover property or money after the illegal transaction has come to an end or has been put at an end by the parties or by the courts, has been often judicially recognized.

Thus, in *Spring Co.* v. *Knowlton*, 103 U. S. 49, where the court sustained a recovery of money paid in part

performance of an illegal contract for the issuance of stock beyond the corporate authority, which the parties subsequently abandoned upon discovery of its illegality, Mr. Justice Woods, who delivered the opinion of the court, said (p. 57):

> "It is to be observed that the making of the illegal contract was *malum prohibitum* and not *malum in se*. There is no moral turpitude in such a contract."

In *M'Cutcheon* v. *Merz Capsule Co.* (C. C. A., 8th Cir.), 71 Fed. Rep. 787, 796, Lurton, Circuit Judge, said:

> "The case of *Spring Co.* v. *Knowlton*, 103 U. S. 49, is highly instructive, and supports the proposition that affirmative relief may be extended to one of the parties *in pari delicto*, where the contract is unexecuted, and he be desirous of rescinding it, provided the contract was not one *malum in se*."

In *Parkersburg* v. *Brown*, 106 U. S. 487, it was held that bonds issued for money by a municipality for the illegal purpose of aiding a private enterprise contrary to the constitution, were void, but that the holders of such bonds, succeeding to the rights of those who purchased them, were entitled to recover from the municipality the amounts so paid. Mr. Justice Blatchford, who delivered the opinion of the court, said (p. 503):

> "The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. 2 Com. Cont. 109. There was no illegality in the mere putting of the property by the O'Briens in the hands of the city. To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal

offender. In such a case the party receiving may be made to refund to the person from which it has received property for the unauthorized purpose, the value of that which it has actually received. *White* v. *Franklin Bank*, 22 Pick. (Mass.), 181."

In *Logan County Bank* v. *Townsend*, 139 U. S. 67, 75, it was held that property coming into possession of a national bank under a contract in violation of an act of Congress, could be recovered by the other party upon restoration to the bank of the consideration. Mr. Justice Harlan, who delivered the opinion of the court, quoted with approval the above extract from the opinion in *Parkersburg* v. *Brown*.

In *Central Transportation Co.* v. *Pullman Palace Car Co.*, 139 U. S. 24, 60, the court held void and non-enforceable a contract of lease in violation of the statutory powers of the corporations plaintiff and defendant, but recognized the right of recovery in such a case of property conveyed under a contract thus put an end to, on principles of natural justice, the contract being "unlawful and void not because it is in itself immoral, but because the corporation by the law of its creation, is incapable of making it."

Subsequently, in *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 65 Fed. Rep. 158, 161, Judges Butler and Dallas held that the contract did not involve moral turpitude, although it had been held to violate public policy, because it consisted of an "*unintentional* wrong, or improper act *innocent* in purpose," and that, therefore, the plaintiff was entitled to disaffirm the illegal contract and recover its property which had been transferred to the defendant

in pursuance thereof, after its repudiation by the defendant. That decision was affirmed in *Pullman's Palace Car Co.* v. *Central Transportation Co.*, 171 U. S. 138, 151, where the court, by Mr. Justice Peckham, said:

> "The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover."

See also, *Tappenden* v. *Randall*, 2 B. & P. 467, 470–472; *Ex parte Bulmer*, 13 Vesey, 313, 315–316; *White* v. *Franklin Bank*, 22 Pick. 181; *Lowell* v. *Boston & Lowell R. R. Corp.*, 23 Pick. (Mass.) 24, 32; *Washington Gas Co.* v. *District of Columbia*, 161 U. S. 316, 327, 328; *Hanauer* v. *Doane*, 12 Wall. 342, 348; *Douglass* v. *Kavanaugh*, 90 Fed. Rep. 373, 378.

C.

The fact that the petitioners, complainants below, refrained from filing a bill until after affirmance of the decree in the Government suit does not charge them with laches. The question of law was doubtful and in litigation. They were justified in waiting until the final adjudication. Good faith required this. If the contract was valid and legal, which they believed, as is conceded, they would necessarily have to abide by the contract and permit the Securities Company to continue to hold the Northern Pacific stock and distribute the dividends. Even if the com-

plainants would have been entitled to rescind and compel restitution without any repudiation or abandonment of the contract on the part of the Securities Company, the pendency of the Government suit since early in 1902 constituted a full excuse for delay, and precludes the defense of laches. *Grand Trunk Railway Co.* v. *Wade*, 140 U. S. 65, 69–70; *Boardman* v. *Lake Shore & Mich. So. Ry. Co.*, 84 N. Y. 157, 182–183; *Cox* v. *Stokes*, 156 N. Y. 491, 511–513. Moreover, it is important to appreciate that, under the doctrine of the *Terre Haute* and *Pullman* cases, the right to sue in disaffirmance for a restoration did not accrue until the illegal combination was put at an end in the Government suit, and the directors took steps towards an abandonment of the scheme and a dissolution of the company.

The contention of the Securities Company in the courts below, in effect, was that it could continue the objects of the illegal combination in perpetuity if it saw fit, in addition to appropriating the complainants' property, and that it was *protected* in so doing by the rule applicable to parties to an executed contract who are *in pari delicto*. The position of the appellant, as stated in its own reply brief in the Circuit Court (p. 23), was as follows:

> "The Securities Company was not put beyond the protection of all the rules of law, or of the particular rule that its right to retain possession of property acquired, though under an illegal agreement, must be respected by parties *in pari delicto*."

D.

The Northern Securities Company further contended below that the illegal contract had been executed, and that this precluded any relief to the petitioners as complainants.

This was but a repetition of its contention in the Government suit, namely, that the combination had accomplished its object and that the transactions had become executed before the commencement of that suit, and hence that a court of equity could not enjoin or prevent what had already been done and consummated. The question was then squarely presented both to the Circuit Court of Minnesota and to this court. Both courts rejected the suggestion as wholly untenable, if not absurd. Disposing of the point in the language of the court below, Mr. Justice Harlan said (193 U. S. 357):

> "It was completely answered by that court when it said: 'Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it.'"

If the transaction between the Northern Securities Company and its original depositors consisted only of the transfer and delivery of the shares as a mere investment under an unqualified contract of purchase and sale, it was complete and executed the moment the exchange

was made, and if that were all that either party contemplated, the contract would have been a valid contract of purchase and sale and would have been fully executed. But, as Mr. Justice Harlan said (193 U. S. 353–354): "This view is wholly fallacious, and does not comport with the actual transaction. . . . If it was, in form, such a transaction, it was not, in fact, one of that kind." Or, as Mr. Justice Brewer put it (at p. 362): "But no such investment by a single individual of his means is here presented." The undertaking and promise of the Securities Company, which embodied the real purpose of the whole transaction, were to hold the shares in one ownership for the future and thereby control the management of the two railway companies. This was clearly implied although not declared from the housetops. The testimony of the promoters quoted in the petition filed herewith leaves no doubt as to this. In order to effectuate this intention of the parties according to the true nature and substance of the transaction, the Securities Company was to permanently hold as custodian and to perform certain duties in the future, and that undertaking was clearly executory. The illegal purpose was to continue indefinitely. We should have to close our eyes to the real transaction if it were now to be accepted as true, as all know it is not, that the Securities Company bought the stocks as mere ordinary investments under unconditional contracts, with the intention not of holding, but of selling or disposing of the same in the market.

To show the fallacy of the plea of the Securities Company that the illegal combination had become

executed, it may be asked: when did it become finally executed and no longer executory? Not when Mr. Hill and associates agreed to combine their holdings as a defensive measure against the interests represented by Mr. Harriman, although that was illegal; not when they endeavored to cement the combination and to effectuate their illegal purpose by organizing the Securities Company and placing the railway stock in its hands, although that was also illegal; not when they practically told Mr. Harriman that the Northern Pacific stock held by the Oregon Short Line would be unsalable and of very little value if it was not put into the combination (p. 199), although that was in further pursuance of the illegal purpose, and in order to coerce acquiescence and silence opposition. The illegal thing was not alone the organization of the corporation nor yet the transfer to or deposit with it of the stocks of the two railway companies. These were but the methods employed to establish and effectuate the illegal purpose and to equip the corporation with the power of carrying out the illegal objects in mind. Having acquired the shares of the two competing railways, the corporation was required to continue to hold them "in perpetuity" and "in one ownership," and to use them in order to execute the purposes of the combination. These are the things that the Securities Company was expected to do in execution and performance of the illegal purposes. These are the things which were implied from the acts and doings of the parties, although they may have studiously omitted to publish their purposes or to declare them in documents or

in board resolutions. These are the things that the Securities Company would be still doing and would continue to do in the future, during the life of its perpetual charter, if the Government had not intervened. These are the things this court decided the Securities Company could not be permitted to continue to do in violation of the statute. And the final thing which the decree in this suit will prevent them from continuing to do, is the *holding* "indefinitely" of the railroad stocks, as they now insist they have the right to do and are *protected* in doing by a legal maxim.

It is also a universally recognized exception to the rule concerning parties *in pari delicto*, that the courts will permit the recovery of property delivered and held under an illegal contract which has been put an end to *in fieri*, when the public interests will be advanced thereby. In the case at bar, the public policy evidenced by the act of Congress in question requires that the Securities Company shall not be permitted to retain in its possession "*in one ownership*" the railway shares, and that it shall not continue to hold the same. If this be so, then the rule denying relief to parties *in pari delicto* does not apply, for the superior interest or concern of the public is to break up such combinations and not to permit them to continue in any form. *Starke's exrs.* v. *Littlepage*, 4 Rand. (Va.), 368, 372; *O'Conner* v. *Ward*, 60 Mississippi, 1025, 1037; 5 Thompson on Corporations, § 6410; 2 Pomeroy's Equity, § 941; Story's Equity Jurisprudence, § 298.

The illegal combination involved in the case at bar was not between private individuals with respect

to a matter that affected their own interests only. It was not a transaction in which there was nothing more than the delivery by one individual of his private property to another in pursuance of some unlawful object, such as a gambling transaction, etc., respecting which the public had no interest further than the enforcement of general penal laws. The subject-matter of the transaction was two great railway systems in the operation and management of which the public is concerned and interested. The immediate property dealt with is the stock—practically all the shares—of those companies. The Attorney-General, suing in behalf of the United States, sought the dissolution of the common control and management of these two great highways which resulted from the holding by the Securities Company of the stock. The court deprived the Securities Company of its power to vote upon the stock and to receive dividends upon it, and by stripping the illegal holding of its fruits rendered the stock of no value in the hands of the Securities Company and thus practically required it to dispose of the stock and forced it to abandon the illegal purpose. And it is indisputably to the public interest that the actual holding or pooling should not continue.

E.

Moreover, the relation of the Northern Securities Company to the unlawful combination was such that it cannot plead illegality of the purpose for which it holds the railroad stocks in order to enable it to retain possession. Courts of justice will not permit a mere custodian,

depositary, trustee, or agent to take advantage of the alleged illegality of the transaction, but will compel him to return or account for the property to the owners.

Thus in *Kinsman* v. *Parkhurst*, 18 How. 289, 293, the court said:

> "Even where money has been received, either by an agent or a joint owner, by force of a contract which was illegal, the agent or joint owner cannot protect himself from accounting for what was so received, by setting up the illegality of the transaction in which it was paid to him."

In *Brooks* v. *Martin*, 2 Wall. 70, 80, Mr. Justice Miller said:

> "There were then in the hands of defendant, lands, money, notes and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the land is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case."

To the same effect, citing *Brooks* v. *Martin*, see *Pointer* v. *Smith*, 7 Heisk. (Tenn.), 137, 144. See also *Manchester, etc. R. R. Co.* v. *Concord R. R. Co.*, 66

N. H. 100, 131; *Newbold* v. *Sims*, 2 S. & R. (Pa.), 317, 319–321.

In *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 500, the court said:

> "*The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them.* Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise express or implied, and the court will not unravel the transaction to discover its origin."

In *Block* v. *Darling*, 140 U. S. 234, the plaintiff sued to recover money deposited by him with the defendant, and it was held that the defendant could not be permitted to show as a defense that the money was placed on secret deposit for the purpose of defrauding creditors of the depositor. Mr. Justice Harlan, who delivered the opinion of the court, said (p. 239):

> "The plaintiff's suit to compel the return of the money may be regarded as one in disaffirmance of the arrangement under which the defendants claimed to have received it; and, if successful, would tend to defeat the alleged purpose of defrauding his creditors by having it kept upon secret deposit with the defendants. It is not a suit to recover money received and paid out under an illegal or immoral contract which has been fully executed. The suit is necessarily a disavowal upon the part of the plaintiff of any purpose to hide this money from his creditors. To allow the defendants to retain it upon the ground that he had originally the purpose to conceal it from his creditors would be

inconsistent with the spirit and policy of the law. *Spring Co.* v. *Knowlton*, 103 U. S. 49, 58, and authorities there cited."

There is also a striking similarity between the case at bar and those cases where money or property has been deposited with a depositary, stakeholder, trustee, or agent, with authority to apply it to an illegal purpose, and the property remains in the hands of such depositary, stakeholder, trustee, or agent after the illegal purpose has come to an end, either by reason of enforced abandonment, voluntary repudiation by mutual consent, or failure to dispose of the property or money in consummation of the illegal purpose. In all such cases, it has been held that the maxim concerning parties *in pari delicto* does not apply at all, that the property or money belongs to the depositor and is held by the other without consideration, and that it best comports with sound principles of public policy as well as natural justice to compel restitution. See *Dwight* v. *Brewster*, 1 Pick. 50, 55; *Sampson* v. *Shaw*, 101 Massachusetts, 145, 151; *Clarke* v. *Brown*, 77 Georgia, 606, 610; *Shannon* v. *Baumer*, 10 Iowa, 210, 211; *Taylor* v. *Bowers*, 1 Q. B. D. 291, 295, 300, 301; *Spring Co.* v. *Knowlton*, 103 U. S. 49, 57; *In re Cronmire, ex parte Waud*, [1898] 2 Q. B. 383, 391, 395, 397.

VIII.

AS TO THE CONVERSION OF THE NORTHERN PACIFIC PREFERRED STOCK INTO COMMON STOCK.

The verified bill of complaint alleged (pp. 4–6) that the petitioners Harriman and Pierce, as trustees for the Oregon Short Line Railroad Company, had

delivered to the Northern Securities Company on November 18, 1901, $78,108,000, par value, of the capital stock of the Northern Pacific Railway Company, being a majority of the outstanding capital stock, of which stock so delivered by said petitioners $41,085,000, par value, was preferred stock, and $37,023,000, par value, was common stock; that it was agreed between Harriman and Pierce and the defendant Northern Securities Company that such $41,085,000 of preferred stock should be converted into common stock; that subsequently at least $34,709,062 thereof was so converted into common stock of the same par value; that said common stock originally owned by said petitioners, namely, $37,023,000, and $34,709,062 of the converted stock had been registered in the name of the Northern Securities Company, and that the Northern Securities Company held within the jurisdiction of the court certificates registered in its own name upon the books of the Northern Pacific Railway Company for all of said stock, making in the aggregate $71,732,000 thereof.[1]

The general rule is well settled that where specific property belonging to another is changed by a custodian, bailee, trustee, or agent into other property or funds, the original owner is entitled to follow it "as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail." "Whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them."

[1] Record, p. 6.

National Bank v. *Insurance Co.*, 104 U. S. 54, 68. See also *Silsbury* v. *McCoon*, 3 N. Y. 379, 390; *McLarren* v. *Brewer*, 51 Maine, 402, 404.

If, therefore, at least $34,709,062 par value of the preferred stock of the Northern Pacific Company was converted into common stock, and Mr. Harriman swears that such was the agreement (pp. 198, 201), your petitioner, the Short Line Company, was entitled to follow and recover the new common stock as fully as it would be entitled to reclaim the old preferred stock if it still existed in its original form.

It was, however, contended by the defendant that, as matter of fact, there was no such conversion, and that the issue of the convertible certificates, the retirement of the preferred stock, and the conversion of the convertible certificates into common stock, although shown to have taken place all on the same day as part of one transaction (pp. 224–226), were to be regarded as separate and isolated transactions through which the Short Line Company could not follow its property. In other words, the argument in effect was that the machinery used and the steps taken changed the real nature of the transaction, and annulled the agreement to convert, and that in truth and substance there was no actual conversion but the payment and retirement of the preferred stock and an independent and disconnected subscription for and issue of bonds convertible into new common stock and a subsequent independent conversion of such bonds into such common stock. This view ought to be sufficiently negatived by the opinion of the Circuit Court of

Appeals for the Eighth Circuit in the recent case of *Weidenfeld* v. *Northern Pacific Railway Company*, 129 Fed. Rep. 305, 309, where the court, speaking of this very transaction, said:

> "*The issue of the convertible certificates and their sale, the retirement of the preferred stock with the proceeds, the retirement in turn of the certificates themselves, and the issue of an equal amount of common stock of the company constituted in a large sense but steps to one ultimate act, and that act was the conversion of the preferred stock into the common stock of the company.* Every conversion of a security of one class into a security of another necessarily implies a retirement of the former, although every retirement does not necessarily signify a conversion. *The issue of the convertible certificates was but a temporary expedient in the process of conversion.*"

Conclusion.

For the reasons stated above and in the petition filed herewith, it is respectfully submitted that a writ of certiorari should issue in this case and that this court should consider and settle the important questions presented.

Washington, D. C., January 23, 1905.

John F. Dillon,
R. V. Lindabury,
Bainbridge Colby,
William D. Guthrie,
R. S. Lovett,
Maxwell Evarts,
Of counsel for petitioners.

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No. 512.

Supreme Court of the United States,

OCTOBER TERM, 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY,
Respondent.

OPINIONS OF CIRCUIT COURT AND CIRCUIT COURT OF APPEALS.

In the Circuit Court of the United States

FOR THE DISTRICT OF NEW JERSEY.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK, Complainants, v. NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILWAY COMPANY, Defendants.	In Equity.

Application has been made on bill, affidavits and exhibits, for a preliminary injunction in a suit brought by Edward H. Harriman, Winslow S. Pierce, the Oregon Short Line Railroad Company and The Equitable Trust Company of New York against the Northern Securities Company and the Northern Pacific Railway Company. The present controversy grows out of a situation created by the final decree of the circuit court of the United States for the district of Minnesota in United States *v.* Northern Securities Co. *et al.*, 120 Fed. 721, and the affirmatory decree of the Supreme Court of the United States in the same case. 193 U. S. 197. That was a suit in equity brought by the United States against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker

and Daniel S. Lamont. Its object was to enforce the provisions of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Anti Trust Act. 26 Stat. 209. Section 1 declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations," and provides that "every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court." Section 2 provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations," shall be deemed guilty of a misdemeanor, "punishable in like manner and to the like extent as offences under the first section." Section 3 declares illegal "every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations," and declares that "every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, "punishable in like manner and to the like extent as offences under the preceding section." Section 4 provides, among other things, that the several circuit courts of the United States shall have "juris-

diction to prevent and restrain violations of this act," and that proceedings under the act "may be by way of petition." The petition or bill of complaint in the Minnesota suit referred to set forth in substance, among other things, that the Northern Pacific Railway Company and the Great Northern Railway Company were common carriers of freight and passengers and, as such carriers, were engaged in trade and commerce among the several states of the United States and with foreign nations; that on and prior to November 13, 1901, the defendants, Hill, Clough, James and Kennedy, and certain other persons whose names were unknown to the complainant, thereinafter referred to as James J. Hill and his associate stockholders, owned or controlled a majority of the capital stock of the Great Northern Railway Company, and the defendants Morgan, Bacon, Baker and Lamont, and certain other persons whose names were unknown to the complainant, thereinafter referred to as J. Pierpont Morgan and his associate stockholders, owned or controlled a majority of the capital stock of the Northern Pacific Railway Company; that these two railway companies at and prior to the doing of the acts thereinafter complained of, owned or controlled and operated two separate, independent, parallel and competing lines of railway, running east and west, forming the Northern Pacific system and the Great Northern system connecting the Great Lakes and the Mississippi River with Puget Sound and the Pacific Ocean; that Hill and his associate stockholders, and Morgan and his associate stockholders, acting for themselves as such stockholders and on behalf of the two railway companies respectively in which they owned or held a controlling interest on and prior to November 13, 1901, entered into an unlawful combination and conspiracy "to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to

monopolize or attempt to monopolize the same, and to suppress the competition theretofore existing between said railway systems in said interstate and foreign trade or commerce," through the instrumentality of a holding company to be created under the laws of New Jersey and to be called the Northern Securities Company, with a capital stock of $400,000,000, to which, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be transferred the capital stock or a controlling interest in the capital stock of each of the two railway companies, with power in the holding corporation to vote such stock and act as the owner thereof, and do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stock; that thus the individual stockholders of the two competing railway companies were to be eliminated, and the Northern Securities Company substituted as a single common stockholder, the interest of such individual stockholders in the property and franchises of the railway companies being converted into an interest in the property and franchises of the holding company; that in pursuance of such unlawful combination or conspiracy, and solely as an instrumentality for affecting the purposes thereof, the Northern Securities Company was, November 13, 1901, created under the laws of New Jersey, with an authorized capital stock of $400,000,000, and on or about the next following day was organized by the election of a board of directors and the selection of a president and other officers; that thereupon Hill and his associate stockholders assigned and transferred to that company a controlling interest in the capital stock of the Great Northern Railway Company, upon an agreed basis of exchange of $180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and Morgan and his associate stockholders assigned and transferred to the Northern Securities

Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of $115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company; that in further pursuance of such unlawful combination or conspiracy the Northern Securities Company offered to the stockholders of the two railway companies to issue and exchange its capital stock for the capital stock of those companies upon the above mentioned basis of exchange, no other consideration being required; that in further pursuance of such unlawful combination or conspiracy the Northern Securities Company had acquired an additional amount of the stock of the two railway companies, issuing therefor its own stock upon the same basis of exchange, and was then holding as owner substantially all of the capital stock of the Northern Pacific Railway Company and a majority of or controlling interest in the capital stock of the Great Northern Railway Company, and was voting the same, collecting the dividends thereon, and in all respects acting as owner thereof in the organization, management and operation of such railway companies, and in receipt and control of their earnings; that thus a virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific railway systems had been effected, a combination or conspiracy in restraint of the trade or commerce among the several states and with foreign nations, formerly carried on by the two railway companies independently and in free competition one with the other, had been formed and was in operation, and the defendants were thereby attempting to monopolize, and had monopolized, such interests and foreign trade and commerce, in violation of the act of Congress of July 2, 1890, above referred to; that no consideration whatever had existed, or would exist, for the above mentioned transfer of the stock of the railway companies by their stockholders to the Northern

Securities Company other than the issue of the stock of the latter company to them in exchange therefor, for the purpose, in the manner, and upon the basis above stated; that the Northern Securities Company was not organized in good faith to purchase and pay for the stock of the two railway companies, but solely to incorporate the pooling of the stock of said companies and to carry into effect such unlawful combination or conspiracy; that the Northern Securities Company was a mere depositary, custodian, holder and trustee of the stock of the railway companies, and its shares of stock were but beneficial certificates issued against such railway stock to designate the interest of the holders in the pool; and that its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 was just sufficient, when all issued, to cover the exchange value of substantially the entire stock of the two railway companies, upon the basis and at the rate agreed upon, such exchange value being about $122,000,000 in excess of the combined capital stock of such railway companies taken at par. Answers and replications were duly filed, evidence was taken and such proceedings were thereafter had in the case that a decree was entered in the circuit court April 9, 1903, pursuant to the prayers of the petition or bill, but not including all the relief therein asked. In that decree it was declared that the defendants, in violation of the Anti-Trust Act, had entered into a combination or conspiracy in restraint of trade and commerce among the several states, and that all of the stock of the Northern Pacific Railway Company and of the Great Northern Railway Company "now claimed to be owned and held by the defendant, The Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States," and a perpetual injunction was granted restraining the Northern Securities Company from "acquiring or attempting to acquire further stock of either of the aforesaid railway

companies," or "voting the aforesaid stock which it now holds or may acquire," or "attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies," or "exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein;" and restraining the Northern Pacific Railway Company and the Great Northern Railway Company respectively and collectively from "permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents at any corporate election for directors or officers of either of the aforesaid railway companies," or "paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold," or "permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies." Immediately after the injunctive portion of the decree is the following clause:

> "But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company, and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, the Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

It may not be without significance, although it is unnecessary now to discuss the point, that the relief prayed in the petition or bill of the United States was in some particulars broader than that granted in the final decree. This decree was in all respects affirmed by the Supreme Court of the United States March 14, 1904, "with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require." Mr. Justice Harlan in his opinion affirmatory of the decree of the court below, among other things, said:

> "No valid objection can be made to the decree below, in form or in substance. * * * The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interest and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose."

No opinion is now expressed or intimated as to the force or effect of the above utterance.

Thereafter the board of directors of the Northern Securities Company adopted March 22, 1904, certain preambles and resolutions, reciting that the company "has acquired and now holds 1,537,594 shares of the capital stock of the Northern Pacific Railway Company, and 1,181,242 shares in the capital stock of the Great Northern Railway Company," and "has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of

the shares of such railway company held by this company," and that "there are now outstanding 3,954,000 shares of its own capital stock," and that it "desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay," and declaring it "necessary and desirable for this company so to reduce its present capital stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it," and advisable that the fourth article of its certificate of incorporation should be so amended as to read as follows:

> "FOURTH.—The capital stock of this company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided inte thirty-nine thousand five hundred and forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine per centum of the shares held by him. Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company."

The resolutions also called for a meeting of the stockholders of the Northern Securities Company, to be held April 21, 1904, for the purpose of taking action upon the proposed alteration of its certificate of incorporation.

The bill in the present suit sets forth in substance,

among other things, that the total authorized capital stock of the Northern Pacific Railway Company in November, 1901, amounted to $155,000,000 par value, consisting of $75,000,000 par value of preferred stock and $80,000,000 par value of common stock; that such proceedings were had in November and December, 1901, that such preferred stock was converted into common stock, so as to make the entire issue of stock of the Northern Pacific Railway Company consist of common stock to the amount of $155,000,000 par value, and such is the authorized amount of its capital stock issued and now outstanding; that the authorized capital stock of the Great Northern Railway Company in November, 1901, was and still is about $125,000,000 par value, of which about $123,000,000 par value has been issued and was then and is now outstanding; that the Northern Pacific and Great Northern railway systems are substantially parallel and in a position to compete with each other in the transaction of interstate and foreign commerce carried on by them; that the Northern Securities Company, although incorporated and organized in form according to and nominally for objects authorized by the laws of New Jersey, in reality was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several states and for objects prohibited by the Anti-Trust Act; that prior to November 13, 1901, Hill, Morgan, Clough, James, Kennedy, Bacon, Baker and Lamont, and their associates, owning or controlling a majority of the capital stock of the Great Northern Railway Company and a majority of the common capital stock of the Northern Pacific Railway Company agreed to organize a holding company under the laws of New Jersey and that such holding company should acquire and permanently hold a majority of the shares of the capital stock of those railway companies respectively and control the operation and management thereof in perpetuity, and that the then existing holders of

such railway shares should deposit the same with such holding company and receive in lieu thereof share certificates of the holding company upon the basis of $180 par value of its stock for each share of the Great Northern Railway stock, and $115 par value of its stock for each share of the Northern Pacific Railway stock, and that the holding company should act as custodian, depositary or trustee of such railway shares on behalf of the existing shareholders of the two railway companies and their associates; that thereupon in pursuance of such agreement the Northern Securities Company was created and organized under the laws of New Jersey, for the object of acquiring and holding shares of the capital stock of other corporations, and with an authorized capital stock of $400,000,000, divided into four million shares of the par value of $100 each, and forthwith agreed to acquire and hold the shares of stock of the two railway companies as custodian, depositary or trustee, and to issue in exchange therefor its own share certificates upon the above mentioned basis; that prior to April 9, 1903, about $176,822,900 par value of the stock of the Northern Securities Company was issued in exchange for about $153,759,400 par value of the stock of the Northern Pacific Railway Company, and about $211,057,600 par value of the stock of the former company was issued in exchange for about $118,124,200 par value of the stock of the Great Northern Railway Company, and about $7,522,000 par value of the stock of the Northern Securities Company was issued for cash used for the purchase of other property and for corporate purposes; that the Northern Securities Company caused the certificates for such railway shares to be transferred to and registered in its own name or the names of its agents and ever since has held and now holds the same so registered; that such issue of capital stock of the Northern Securities Company for the stock of the two railway companies was to the then existing holders of stock in such railway companies in

exchange for certificates for such railway stock and for the purpose of effectuating the above mentioned scheme or combination whereby the Northern Securities Company, holding a majority of the shares of stock of the two railway companies, would be enabled to control the operation and management of the same; that all the persons to whom stock of the Northern Securities Company was issued for shares of either of the railway companies or for cash had full knowledge of the purposes for which it was organized, and of the fact that a majority of the capital stock of each of the railway companies had been or was to be deposited with it as custodian or depositary in pursuance of the above mentioned agreement; that prior to the time of the incorporation and organization of the Northern Securities Company, the Oregon Short Line Railroad Company had acquired and at that time owned $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, represented by certificates issued to and registered in the names of the complainants Harriman and Pierce; that after the incorporation of the Northern Securities Company had been resolved upon Harriman, Pierce and the Oregon Short Line Railroad Company agreed with the promoters and incorporators of the former company to transfer to and deposit with it under the terms and conditions before stated, the shares of the Northern Pacific Railway Company of the aggregate par value of $78,108,000 owned by the Oregon Short Line Railroad Company, and to receive in exchange therefor certificates of the Northern Securities Company representing an inrerest therein of $82,491,871, par value, and $8,915,629 in cash, and in pursuance of such agreement Harriman and Pierce, acting for the Oregon Short Line Railroad Company, did, on or about November 18, 1901, transfer and deliver to the Northern Securities Companies certificates for $37,023,000 par value of the common stock and

$41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, owned by the Oregon Short Line Railroad Company, and received in exchange therefor certificates of the Northern Securities Company representing an interest of $82,491,871 par value, and the above mentioned sum of $8,915,629 in cash; that Harriman and Pierce are now, and ever since November 18, 1901, have been, the registered owners and holders of the $82,491,871 par value of the shares of the Northern Securities Company, and such holding of stock is and at all times has been by them as trustees for the use and benefit of the Oregon Short Line Railroad Company, which is the beneficial owner thereof; that the $82,491,871 par value of the stock of the Northern Securities Company so standing in the names of Harriman and Pierce, was part of the original issue of stock by that company; that the above mentioned exchange was made by Harriman and Pierce and the Oregon Short Line Railroad Company in good faith and in the belief that the organization of the Northern Securities Company was not, and the acquisition and holding by it of the stock of the two railways as stated would not be, in violation of any statute of the United States, and it was owing to such belief that the complainants did not, pending the final determination of the suit brought by the United States in Minnesota, take any steps or institute any proceedings for the protection of their rights in the premises; that the Oregon Short Line Railroad Company by indenture dated July 17, 1902, duly pledged $82,491,000 par value of the stock of the Northern Securities Company with The Equitable Trust Company of New York, as trustee, for an issue of bonds of that railroad company, of which bonds $82,491,000 face value have been certified and issued and are now outstanding; that the stock of the Northern Securities Company, so issued to Harriman and Pierce November 18, 1901, is still registered in their names and the certificates therefor duly endorsed are now in the act-

ual custody of The Equitable Trust Company of New York as pledgee, and are available for tender, return or restoration to the Northern Securities Company; that at the time of such exchange, on or about November 18, 1901, it was agreed between Harriman and Pierce and the Northern Securities Company that the $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company should be coverted into common stock of that railway company, and such preferred stock was subsequently, in or about December, 1901, coverted by the Northern Securities Company into such common stock of the same par value; that certificates for $34,709,062 par value of such common stock registered in the name of the Northern Securities Company on the books of the railway company were substituted in lieu of the certificates for such preferred stock; that the Northern Securities Company caused such original common stock to be transferred to it upon the books of the railway company, and now holds within the jurisdiction of this court certificates registered in its name on the books of the railway company, namely, the Northern Pacific Railway Company, for such common stock so originally received from Harriman and Pierce, and for the common stock into which such preferred stock was so converted and certificates substituted as above mentioned. The bill then sets forth in substance the proceedings in United States *v.* Northern Securities Company *et al.*, 120 Fed. 721, and the final decree therein of the circuit court and the decree of the Supreme Court of the United States on appeal. The bill further alleges in substance that the complainants were represented in that suit by the Northern Securities Company and the Northern Pacific Railway Company as well as by the individual defendants, Morgan, Bacon, Baker and Lamont, who were named as the representatives of original holders and owners of the stock of the Northern Pacific Railway Company acquired and held by the Northern Securities

Company; that the effect of the decree of the circuit court as affirmed by the Supreme Court of the United States was to adjudge that the Northern Securities Company was not a purchaser or owner, but simply a custodian, of the shares of stock of the two railway companies acquired and held by it; that it acquired and held possession thereof in violation of the Anti-Trust Act; that it acquired no title thereto and cannot transfer any rights in respect thereof; that the legal and equitable owners thereof were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns; that immediately upon the rendition of the decision of the Supreme Court of the United States the Northern Securities Company, through its board of directors, determined fully and unreservedly to abandon and terminate the above mentioned combination and its holding of such railway stock, and to that end to reduce the capital stock of the company by ninety-nine per cent. thereof, or to $3,954,000 par value, and to distribute and divide the stock of the two railway companies held by it, *pro rata* among its own stockholders, but not to return and re-transfer to the stockholders of those railway companies, respectively, or their assigns, any of the shares of stock in either of them which it, the Northern Securities Company, originally received from such stockholders in exchange for its own stock; that in order to consummate such purposes the board of directors of the Northern Securities Company on or about March 22, 1904, adopted the preambles and resolutions hereinbefore referred to; that thereupon a circular or notice was issued by and on behalf of that company to its stockholders, notifying them of a special meeting for the purpose of voting upon the proposition submitted by the directors in the resolutions adopted; that such meeting of stockholders was held April 21, 1904, and at it the stock of the Northern Securities Company was reduced ninety-nine per cent. by a vote of more

than seventy five per cent. in interest of its stockholders, and by a like vote the proposed plan of *pro rata* distribution was assented to, but the complainants then and there duly protested that such plan of distribution was illegal and in violation of their rights; that such plan is unauthorized by law, illegal and *ultra vires* the Northern Securities Company, in violation of the rights and equities of the complainants, and of the laws of the United States and of New Jersey; that such plan has never been assented to by the complainants and is not binding upon them; that the books and records of the Northern Securities Company show for what purpose or consideration each outstanding certificate of stock was originally issued, whether for cash or for stock of the Northern Pacific Railway Company or of the Great Northern Railway Company, and will disclose that a large part of the stock of the Northern Securities Company, issued originally in exchange for stock of those railway companies, is now held in the name or on behalf of original holders who exchanged the same for stock of the railway companies, and, wherever there have been transfers of certificates to third parties, the origin of each and every outstanding certificate of stock of the Northern Securities Company so transferred to third parties can be so traced and shown in and by such books and records that the assignees of the original holders can be identified and the stock of either railway company originally exchanged by the assignors can be delivered to such assignees in exchange for their present holdings of stock of the Northern Securities Company; that the Northern Securities Company threatens and intends immediately to distribute the shares of stock of each of the two railway companies *pro rata* among its, the Northern Securities Company's, stockholders in disregard of the rights of the complainants, and unless enjoined by this court from so doing, will forthwith make such distribution, whereby stock of the Northern Pacific

Railway Company belonging to the complainants, and to which they are entitled will be lost by them, and they will thereby suffer injury which cannot be compensated in damages, in that the shares of stock of that railway company to which they are so entitled are registered on the books of the railway company in the name of the Northern Securities Company, and those railway company shares or any like amount of such shares cannot be purchased in any market or from any persons; that the proposed distribution *pro rata* in lieu of the return and restitution of the stock of the railway companies would involve a loss of annual income to the complainants amounting to over $1,000,000, the dividends at the rate now paid upon the stock of the Northern Pacific Railway Company to which they are entitled exceeding by more than $1,000,000 per annum the dividends upon the stock of the Great Northern Railway Company and Northern Pacific Railway Company which they would receive upon such *pro rata* distribution; that the value of the stock of the Northern Pacific Railway Company to which the complainants are entitled now exceeds and at all times mentioned in the bill exceeded by more than $10,000,000 the aggregate value of the *pro rata* share of the stock of the two railway companies which they would receive upon such *pro rata* distribution, which would be $32,070,612 par value of stock of the Northern Pacific Railway Company and $24,638,919 par value of stock of the Great Northern Railway Company, instead of $78,108,000 par value of stock of the former company; that the complainants are ready, able and willing, and offer, to return and deliver, or cause to be returned and delivered, and they tender, to the Northern Securities Company all the certificates for the shares of its capital stock so received by them, and such part of the above mentioned sum of $8,915,629 in cash, paid to them by or on behalf of that company, as may be just, or such further or other sum as the court shall fix, in exchange for and upon the return of the

common stock of the Northern Pacific Railway Company, delivered and exchanged by them as above stated, and the common stock of such railway company into which the preferred stock so exchanged was converted, and they offer to bring into court such stock of the Northern Securities Company and such moneys whenever the court shall direct, and in all respects to do equity and right in the premises; and that, after the return and restoration to the original depositors or their assigns of all the shares of stock of the railway companies, acquired and held by the Northern Securities Company, as above stated, there will remain in the treasury of that company assets and funds sufficient to pay and redeem all of the $7,522,000 par value of its stock issued for cash, or to fully compensate any holders thereof if compensation be adjudged. The complainants pray that it may be decreed that the proposed plan of distribution is illegal and in violation of their right and equities, and that they are entitled to the return and transfer to them by the Northern Securities Company of the shares of common stock of the Northern Pacific Railway Company, which were so delivered by Harriman and Pierce, and the shares of common stock into which the preferred stock of that railway company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by the complainants, and such sum in cash as may be just; that the Northern Securities Company may be ordered and directed to endorse the certificates now held by it for such stock of the Northern Pacific Railway Company to the Oregon Short Line Railroad Company, or in blank, and deliver the same to The Equitable Trust Company of New York in exchange for the stock of the Northern Securities Company now held by such trust company, to be subject to its rights and lien as trustee; that the Northern Securities Company be perpetually enjoined and restrained from parting with, disposing

of, transferring, assigning or distributing any part of the stock of the Northern Pacific Railway Company received from Harriman and Pierce, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to the complainants in exchange for its own stock issued as above stated and the cash now tendered by them; that the complainants have such other or further relief as shall be proper under the circumstances; and that the Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing the stock of the Northern Pacific Railway Company in question, or any part thereof, or any certificates now representing the same during the pendency of this suit.

The defense controverts material allegations in the bill, some of which embody averments of fact, and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. On the face of the bill it is evident that the final decision necessarily will involve the consideration of grave, novel and delicate questions of law. On the presentation of their arguments for and against the awarding of a preliminary injunction counsel on both sides have with strong insistance urged, and with elaboration and signal ability discussed, a number of legal propositions, important and far reaching in their scope, and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact remains that the eminent counsel advancing them have during a hearing of nearly three days pressed them with zeal and in manifest reliance upon their soundness and materiality. The briefs of argument and authorities, containing nearly 800 printed pages, and principally devoted to the discussion of the principles

of law and equity deemed applicable to the case, fairly may be accepted as evidence that much may seriously be said on each side about the law, if not the facts, involved. The case not being ripe for a final decision, the present application is for a preliminary injunction. The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree, as between the

showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the *status quo*, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant. These views are supported by abundant authority to which, were it not for the importance of the case, I should refrain from adverting. In Russell *v.* Farley, 105 U. S. 433, 438, the court through Mr. Justice Bradley said:

> "It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. Kerr on Injunctions, 209, 210. And if the legal right is doubtful, either in point of law or fact, the court is always reluctant to take a course which may result in material injury to either party."

In City of Newton *v.* Levis, 79 Fed. 715, the circuit court of appeals for the eighth circuit, through Judge Sanborn, said:

> "The granting or withholding of a preliminary injunction rests in the sound judicial discretion of the court, and the only question presented by this appeal if whether or not the court below erred in the exercise of that discretion,

under the established legal principles which should have guided it. The propriety of its action must be considered from the standpoint of that court. * * * The controlling reason for the existence of the right to issue a preliminary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. When the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond if the injunction is granted. A preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience of the opposing party will be comparatively small and insignificant if it is granted. * * * The arguments and brief of counsel invite us to a consideration of the questions of law which must be finally determined upon a demurrer to the bill, or upon a final hearing of this case after answer. We have, however, found it unnecessary to decide these questions on this appeal, and we express no opinion upon them. They are of sufficient importance and difficulty to demand careful examination and deliberate consideration," &c.

In Glascott *v.* Lang, 3 Myl. & C. 451, 455, Lord Chancellor Cottenham said:

"In looking through the pleadings and the evidence for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the court finds, upon the pleadings, and upon the evidence, a

case which makes the transaction a proper subject of investigation in a court of equity."

In Hadden *v.* Dooley, 74 Fed. 429, 431, the circuit court of appeals for the second circuit, through Judge Shipman, said:

> "When the questions which naturally arise upon the transactions make them a proper subject for deliberate examination, if a stay of proceedings will not result in too great injury to the defendants, it is proper 'to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined' by evidence and proofs which have the merits of accuracy."

In Great Western R. Co *v.* Birmingham, &c., R. Co., 2 Phil. Ch. 597, Lord Chancellor Cottenham said:

> "It is certain that the court will in many cases interfere and preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title; but it would embarrass the original purchaser in his suit against the vendor which the court prevents by its injunction. * * * It is true that the court will not so interfere if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff. If, then, this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail. Is, then, the case stated by the bill so clear in favor of the defendants, and so inadequate to support the relief prayed by the bill, as to justify the court in permitting it to be disposed of, and new titles or interests to be introduced, before any decision can be obtained upon the case so made?"

In Shrewsbury & Chester R. Co. *v.* Shrewsbury R. Co., 1 Sim., N. S., *410, *426, *427, *432, the Vice-Chancellor, Lord Cranworth, said:

> "When the court is called on to interfere to preserve property *pendente lite*, there are, I apprehend, two points on which the court must satisfy itself. First, it must satisfy itself, not that the plaintiff has, certainly, a right, but that he has a fair question to raise as to the existence of such a right. * * * Where it is made out that there is a point to be decided which the plaintiff is fairly raising, still there is a further question, namely, whether interim interference, on a balance of convenience and inconvenience to the one party and to the other, is or is not expedient. Where the alternative is interference or probable destruction of the property, there, of course, the court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant. But where, on the other hand, the only evil to result from non-interference is, that the plaintiff may, by the contracts or deeds of the defendant, be retarded or embarrassed in his litigation, there the court will be far more ready to listen to any suggestion of the defendant showing that interference during litigation will prejudice his rights. * * * Although I am perfectly satisfied of the authority of this court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that may embarrass the plaintiff in his suit, and that the court is entitled to do so whenever it sees there is a fair ground for litigation raised by the plaintiff, yet that right of the court must be guided by a discretion not to exercise it where it sees that on the balance of convenience and inconvenience between interim interference and non-interim interference the balance greatly preponderates in favor of the defendant and against the plaintiff."

In the above case a preliminary injunction was refused on the ground of the "enormous preponderance of inconvenience in granting the injunction

over any possible inconvenience in refusing it." The doctrine of the foregoing cases is contained in many others from which there is no occasion to quote. Denver & R. G. R. Co. *v.* United States, 124 Fed. 156. Allison *v.* Corson, 88 Fed. 581. Buskirk *v.* King, 72 Fed. 22. Sanitary Reduction Works *v.* California Reduction Co., 94 Fed. 693. Southern Pac. Co. *v* Earl, 82 Fed. 690. New Memphis Gas & Light Co. *v.* Memphis, 72 Fed. 952. Indianapolis Gas Co. *v.* Indianapolis, 82 Fed. 245. Georgia *v.* Brailsford, 2 Dall. 402.

It does not appear, nor has it been claimed or intimated, that the granting of the preliminary injunction asked for would interfere with the operation of the Northern Pacific Railway Company and the Great Northern Railway Company, or either of them, or otherwise prove detrimental to the interests of the public. It undoubtedly would, during the continuance in force of the injunction, preclude the stockholders of the Northern Securities Company, or a considerable proportion of them, from directly or indirectly receiving dividends on the stock of either of the railway companies, unless under and by virtue of some voluntary and extra judicial arrangement. But this court has power to require of the complainants as condition precedent to the issuing of the injunction, a bond in such form and amount as fully to indemnify all persons, who may ultimately be found entitled to such dividends against all loss or damage resulting from the suspension of their payment. On the other hand, the denial of a preliminary injunction would, if the complainants should ultimately prevail, render barren their victory so far as relief in this suit is concerned. The stock of the two railway companies would be distributed *pro rata* among the stockholders of the Northern Securities Company in accordance with the plan of distribution adopted by the latter company. The complainants would receive, instead of stock of the Northern Pacific Railway Company of the par value of

$71,732,062 claimed by them, stock of that company amounting at par to only $32,070,612, and stock of the Great Northern Railway Company of the par value of $24,638,919. The difference in the par value between the stock of the Northern Pacific Railway Company claimed by the complainants and the stock of that company which they would receive under the proposed plan is $39,661,450. If the complainants be sustained in their contention here made as to their ownership and right to recover stock, such right would not extend to stock of the Great Northern Railway Company, but only to stock of the Northern Pacific Railway Company. A *pro rata* distribution under the proposed plan of the $39,661,450 par value of stock of the latter company included in the amount now sued for, among the stockholders of the Northern Securities Company, other than the complainants, would not only debar the latter from any relief to which they may be entitled under their present bill, but to a moral certainty entail upon them a burdensome multiplicity of suits attended with great labor and expense. It would also obviously be calculated to hinder, embarrass and probably or possibly defeat them in their effort to recover large quantities of such stock from persons purchasing the same in good faith and for full consideration, directly or indirectly, from the stockholders of the Northern Securities Company participating in such *pro rata* distribution, through the creation of new equities on the part of such purchasers. In view of the character of the questions involved in this case it would be highly inequitable that the complainants should, in advance of any final decision on the merits, be put in such a position as to be precluded, either wholly or in large measure, from the realization and enjoyment of the fruits which should be theirs through the immediate result of a final decree in the present case should it ultimately be determined in their favor.

It appears from the bill, affidavits and exhibits

that, aside from any question of right between the parties to one kind of stock in contradistinction to another, the real value in dispute is of great magnitude. For $37,023,000 par value of common stock and $41,085,000 par value of preferred stock of the Northern Pacific Railway Company turned over by Harriman and Pierce to the Northern Securities Company November 18, 1901, the latter company issued to them $82,491,871 par value of its stock and also paid them $8,915,629 in cash. All of the common and preferred stock so turned over by Harriman and Pierce, aggregating $78,108,000 par value, was taken by the Northern Securities Company at an agreed real valuation of $115 for each $100 at par without distinction between common and preferred stock. The plan of *pro rata* distribution of the Northern Securities Company contemplates the transfer and assignment to all stockholders of that company of both preferred stock of the Great Northern Railway Company and common stock of the Northern Pacific Railway Company, in such manner that each and every holder of stock of the Northern Securities Company will, on the basis of the surrender to it for cancellation of 99 per cent. of such stock, receive for each $100 par value of such surrendered stock $30.17 par value of the preferred stock of the Great Northern Railway Company and $39.27 par value of the common stock of the Northern Pacific Railway Company. Under the proposed plan the holders of the remaining one-hundredth of the stock of the Northern Securities Company would also be entitled to share in the residue of property in the treasury of that company remaining after the reduction of its stock by 99 per cent. The complainants hold $82,491,871 par value of the stock of the Northern Securities Company, and, as before stated, would receive $24,638,919 par value of the preferred stock of the Great Northern Railway Company and $32,070,612 par value of the common stock of the Northern Pacific Railway Company.

The present real or market value of the preferred stock of the former company is about, and is admitted to be, $170 for each $100 par value, while that of the common stock of the Northern Pacific Railway Company is $135 for each $100 par value. Under the proposed plan the real value which the complainants would receive in stock of the Great Northern Railway Company would be $41,886,162, and the real value which they would receive in stock of the Northern Pacific Railway Company would be $41,295,326, making a total of $83,181,488, aside from any interest they might have in any undisposed of residue of property remaining in the treasury of the Northern Securities Company. Reference will later be made to such undisposed of residue. It appears from the affidavits and exhibits that in November, 1901, the Northern Pacific Railway Company adopted a plan for the conversion of all its preferred stock into common stock; the preferred stock then amounting to $75,000,000 par value, and the common stock to $80,000,000 par value. Under this plan the Northern Securities Company, as the Holder of $37,023,000 par value of the common stock, became entitled to surrender preferred stock of the Northern Pacific Railway Company and receive therefor seventy five eightieths of its par value in the new common stock. There is evidence furnished by the affidavits and exhibits that the Northern Securities Company exercised this right and received of such new common stock $34,709,062 at par. If such be the fact, the latter company thereupon became the holder of $71,732,062 par value of the common stock, the real value of which at $135 for $100 par value is $96,838,283. The deduction from the $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company of the $37,023,000 par value of such stock, the surrender of which to that company for cancellation was necessary for the acquisition of the $34,709,062 of its new common stock, left a balance of $4,062,000 par value of its preferred stock. If this

balance was sold or disposed of at par,—and it may reasonably be inferred from the affidavits and exhibits that it was not sold or disposed of for less,—its proceeds, $4,062,000, fairly may be treated as an offset to the cash payment of $8,915,629, originally made by the Northern Securities Company to Harriman and Pierce. On this theory the balance of the $8,915,629 over the $4,062,000, amounting to $4,853,629, when deducted from $96,838,283, the present real value of the $71,732,062 par value of the common stock of the Northern Pacific Railway Company, leaves a balance of $91,984,654. From this balance would be deducted $83,181,488 which the complainants would receive under the *pro rata* plan, leaving $8,803,166 in their favor, less the amount of their share of the above mentioned residue in the treasury of the Northern Securities Company and a just allowance of interest on the cash balance. The above mentioned sum of $8,915,629 paid by the Northern Securities Company to Harriman and Pierce November 18, 1901, had been loaned to that company by the firm of J. P. Morgan & Company. On or about January 1, 1902, $6,375,938 par value of the $41,085,000 par value of preferred stock of the Northern Pacific Railway Company originally transferred by Harriman and Pierce to the Northern Securities Company, having previously been surrendered to the Northern Pacific Railway Company and retired, its proceeds, amounting to its par value, were paid by the Northern Securities Company to J. P. Morgan & Company in partial liquidation of the cash loan of $8,915,629 made by that firm to the latter company. The affidavits and exhibits furnished evidence of some weight that the above mentioned par value of $6 375,938 of preferred stock of the Northern Pacific Railway Company was deducted by the Northern Securities Company from the $41,085,000 par value of preferred stock of that railway company, thereby reducing the latter amount to $34,709,062 at par, and that the remaining preferred stock, namely $34,709,062 par value

was, through the instrumentality of convertible certificates issued by the Northern Pacific Railway Company converted into new common stock of equal par value. If such be the case, the claim of the complainants would extend to the $37,023,000 par value of the old common stock, and the $34,709,062 par value of the new common stock, aggregating $71,732,062 par value of common stock, having a real value of $96,838,283. The deduction from this amount of $2,539,691, representing the difference between the original cash payment of $8,915,629 and $6,375,938, proceeds of preferred stock retired, should be deducted from the total amount, leaving a balance amounting in real value to $94,298,592. Deducting from this amount $83,181,488, which the complainants would receive under the proposed distribution, leaves $11,117,104 in their favor, less the amount of their share of the residue in the treasury of the Northern Securities Company after the proposed distribution. There should also be a further deduction of such sum by way of interest on cash received as above stated by Harriman and Pierce from the Northern Securities Company as may be just. This item, however, would be of comparative insignificance in its relation to the other values involved in the suit. In a journal of the Northern Securities Company is the following entry:

"1901.

Novbr. 18th.

INVESTMENT ACCOUNT NO. 1.
TO CAPITAL STOCK a/c.

For 410,850 shs. N. P. Pfd. stock bought from E. H. Harriman and Winslow S. Pierce for.....	$41,085,000
Less paid in cash as per entry in cash book this day.....	8,915,629
Balance paid in stock.....	$32,169,371

say 321,693 shs. & $71 scrip issued as fully paid up stock at par."

Whatever may be the merit of this entry as viewed from the standpoint of scientific bookkeeping, the words and figures "Balance paid in stock $32,169,371," are, when considered in connection with other exhibits and the affidavits, confusing and misleading in their bearing upon the conversion, whether directly or indirectly, of preferred stock of the Northern Pacific Railway Company originally turned over by Harriman and Pierce to the Northern Securities Company into new common stock of the former company. Any assumption that the above mentioned balance of $32,169,371 par value of preferred stock of the Northern Pacific Railway Company was not converted, either at par or on the seventy five eightieths basis, into new common stock of that company, by the Northern Securities Company, appears irreconcilable with controlling evidence touching the conversion of preferred into common stock, furnished by the affidavits and exhibits considered as a whole. A fact, which on the present showing seems indisputable, is that the Northern Securities Company, in addition to the $37,023,000 par value of the common stock of the Northern Pacific Railway Company originally turned over to the former company by Harriman and Pierce, acquired through the instrumentality of convertible certificates issued by the railway company new common stock of the par value of $34,709,062. It is unimportant, so far as the point under immediate discussion is concerned, whether that amount of new common stock was secured, on the one hand by a surrender to the railway company of $37,023,000 par value of its preferred stock on the seventy-five eightieths basis, or, on the other, by a surrender to the railway company of its preferred stock of the par value of $34,709,062 for its new common stock of the same par value. It is not claimed or suggested that the balance of $32,169,371 par value of preferred stock, mentioned in the journal entry, was sold by the Northern Securities Company absolutely for cash and without intention on its part,

directly or indirectly, to convert such balance of preferred stock into the new common stock of the Northern Pacific Railway Company. Any such contention would, on the present showing, be wholly inadmissible. The affidavits and exhibits fail to disclose, and counsel have not attempted to explain, how that balance of preferred stock was, or, on any basis or theory justified by the evidence, could have been, converted into $34,709,062 par value of the new common stock of the Northern Pacific Railway Company. Yet, if, notwithstanding the foregoing considerations, it be assumed that only $32,169,371 par value of the original $41,085,000 par value of preferred stock of that railway company, transferred by Harriman and Pierce to the Northern Securities Company, was converted into the new common stock of the railway company of an equal par value, the old and new common stock would aggregate $69,192,371 par value or a real present value of $93,409,701. The deduction from the latter amount of the $83,181,488 which the complainants would receive under the proposed *pro rata* distribution would leave a balance of $10,228,213 of real value in their favor, less the amount of their participation in the residue of the property remaining in the treasury of the Northern Securities Company. Or, further, if it be assumed that the $32,169,371 par value of preferred stock of the Northern Pacific Railway Company was converted into new common stock of that company on the basis of seventy-five eightieths, it would represent $30,158,785 par value of new common stock, the real value of which is $40,714,360. This latter sum added to $49,981,050 representing the real value of $37,023,000 par value of the old common stock would aggregate $90,695,410, and the deduction from this sum of the $83,181,488 which the complainants would receive under the proposed distribution, would leave a balance of $7,513,922 of real value in their favor, less their share of the residue of the

property in the treasury of the Northern Securities Company.

The stock of the Northern Securities Company outstanding April 21, 1904, and presumably now outstanding, is of the par value of $395,400,000, divided into 3,954,000 shares of the par value of $100 each. That company now holds 1,537,594 shares of the stock of the Northern Pacific Railway Company and 1,181,242 shares of stock of the Great Northern Railway Company, of the par value of $100 each. The proposed *pro rata* plan of distribution contemplates the reduction of the total outstanding stock of the Northern Securities Company by 99 per cent. To accomplish this result the Northern Securities Company offers, on the surrender to it of that proportion of its stock, amounting at par to $391,446,000, to deliver or pay for each $100 par value thereof surrendered $39.27 par value of stock of the Northern Pacific Railway Company, and $30.17 par value of stock of the Great Northern Railway Company, and "proportional amounts thereof for fractional shares of the stock of this company." $39.27 on each $100 of $391,446,000 so closely approximates to the par value of the 1,537,594 shares of stock of the Northern Pacific Railway Company that for any practical purpose on the present application it may be considered equal to it. And $30.17 on each $100 of $391,446,000 so closely approximates to the par value of the 1,181,242 shares of stock of the Great Northern Railway Company that for any such purpose it may be considered equal to it. Thus, the surrender of ninety-nine one hundredths of the outstanding stock of the Northern Securities Company would necessarily involve the transfer and alienation by it of practically all the stock of the Northern Pacific Railway Company and Great Northern Railway Company now held by it. Whatever of real value the remaining one-hundredth of the par value of the outstanding stock of the Northern Securities Company, $3,954,000, might represent, would consist wholly, or practically wholly, of property other

than stock of both or either of the two railway companies. It does not appear from the affidavits and exhibits what amount of property would remain in the treasury of the Northern Securities Company after the distribution of the railway stock referred to. Nor does it appear whether the company is or is not indebted, nor whether there are or are not other charges or expenses paramount to the claims of the holders of the remaining one-hundredth of its stock. As between the complainants applying for a preliminary injunction, and the Northern Securities Company resisting the application partly on the ground that the real value in dispute is not sufficient to warrant an exercise of the injunctive power, the burden of showing the amount of property in which the complainants would share under the proposed plan clearly, in view of the fact that the company is chargeable with full knowledge of the character, amount and condition of its own property and finances, rested upon it. It must be presumed to have been able to make such a showing. Its failure so to do gives rise to an unfavorable inference. But even if it be assumed that the real value of the residue of the property would be $3,954,000, the par value of the remaining stock, the complainants would under the proposed plan, in the absence of any reduction or obliteration of the fund through possible indebtedness or other charges or expenses, receive as their share approximately $824,919. This sum, though a large amount, is but a small proportion of the real value which the complainants would receive, if entitled to recover. It is less than one-twelfth of $11,117,104; less than one-eleventh of $10,228,213; less than one-ninth of $8,803,166; and less than one-eighth of $7,513,922. It is unnecessary, and would be tedious to discuss in this connection, and on the present application the subject of interest, as at most it is a matter of comparative insignificance. In leaving the discussion of real values involved in this suit, it should be borne in mind that the right of the complainants

to recover, if it exists, extends to stock of the Northern Pacific Railway Company, amounting on the present showing to from $69,000,000 to $71,000,000 approximately at its par value, and to a much larger sum at its real value, and that they disclaim all right to the stock of the Great Northern Railway Company which the Northern Securities Company insists should be taken by them, instead of the larger amount of the stock of the Northern Pacific Railway Company claimed by them. From this point of view there possibly may be some doubt of the pertinency of the foregoing discussion of balances of real values to the consideration of the propriety of granting or withholding the injunction. On this point no opinion is expressed. It was urged by the defense at the hearing that the granting of the relief sought by the complainants would be injurious to many stockholders of the Northern Securities Company, other than the complainants, who acquired their stock in good faith and for full consideration, for the reason that in many instances and to a large amount stock of that company had been so issued or transferred as to render it impossible to trace or identify the consideration of such issue or transfer. It appears that prior to April 9, 1903, stock of the Northern Securities Company of the par value of $7,522,000 was issued for cash used in the purchase of stock of the Great Northern Railway Company and other stocks held by the Northern Securities Company, and also that its stock to a large amount has been transferred from time to time among and is now held by a large number of persons. The bill avers that those becoming stockholders of the Northern Securities Company, whether for shares of the Northern Pacific Railway Company or the Great Northern Railway Company or for cash, had full knowledge and information of the purposes for which the first named company was organized, and the affidavits are conflicting

on the question whether or not the nature and amount of the consideration for the issue or transfer of stock of that company can be traced and identified on its books or otherwise. It is manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence now before the court. They require deliberate investigation in the accustomed mode on evidence taken in due course and in the light of an examination of books and papers produced before a master. It should also be borne in mind that this court, as a court of equity, has power so to mold its decrees and impose such terms as may be necessary to protect the equities of persons who may be affected by its action.

Language justly applicable to the present case was employed by Judge Sanborn in Denver & R. G. R. Co. *v.* United States, 124 Fed. 156, 161, as follows:

> "The case falls well within the established rule that a preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or of fact to be ultimately determined are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted."

An appeal does not lie from an interlocutory decree of this court denying a preliminary injunction. While this consideration is entitled to no weight where, on the application for an injunction, it clearly appears that the complainant cannot prevail on the final hearing, it is often of controlling importance where, on such application, there is room for reasonable doubt as to the ultimate result. Under the circumstances, this court would not be justified in refusing the injunction sought. Such refusal would not be an exercise of sound judicial discretion. It would not only be improvident in the extreme, but betray peculiar insensibility to the

fallibility of human judgment so often accentuated by differences of opinion in even the highest judicial tribunals.

An interlocutory decree for a preliminary injunction may be prepared and submitted.

EDWARD G. BRADFORD, *J.*

July 15, 1904.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

NORTHERN SECURITIES COMPANY

v.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK.

Before ACHESON, DALLAS and GRAY, Circuit Judges.

DALLAS, Circuit Judge:

This is an appeal by the Northern Securities Company from a decree of the Circuit Court for the District of New Jersey awarding a preliminary injunction, by which that company was restrained from disposing of 717,320 shares of the common stock of the Northern Pacific Railway Company. It appears from the opinion of the learned judge of the court below that in granting this injunction he was materially influenced by the consideration that the questions involved were, as he viewed them, serious and doubtful, and that a decision by him denying the injunction would, if made, not be reviewable upon appeal. We think that upon this ground he was justified in requiring that the *status quo* should be preserved, and the subject matter of the controversy be withheld from dissipation until the judgment of this court could be obtained. But

now the substantial rights of the parties only need be considered, and whether the injunction should stand or be dissolved, ought, in our judgment, to be determined upon the merits, and without further delay. *Western Union Telegraph Co.* v. *Pennsylvania R. Co.*, 123 Fed. Rep. 33–36. There have been cases, it is true, in which it has been held that where the court of first instance has unreservedly exercised its discretion in granting or refusing a preliminary injunction, its action ought not to be interfered with by an appellate court "unless there is some strong reason for it." *Massie* v. *Buck*, 128 Fed. Rep. 31. But to the circumstances of this case those rulings are inapposite. Attentive reading of the opinion of the learned judge of the Circuit Court has satisfied us that he regarded the fact that an appeal would not lie from a denial of the injunction as "of controlling importance," and that his decision was made with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy by this court; and we think that reason and justice demand that such an adjudication shall not be further postponed. The injunction complained of precludes the enjoyment of rights of ownership in property of great value; the facts upon which the propriety of upholding it depends are unquestionably disclosed in the record before us, and the principles by which the legality of the order awarding it must be tested are indubitable, and may be as readily applied now as at any time hereafter. The only substantial question is

as to whether the decree below was accordant with law, and that question this court could not refuse to determine, without in effect renouncing the appellate jurisdiction which Congress has expressly conferred upon it.

In November, 1901, the Northern Securities Company was incorporated under the laws of the State of New Jersey. Its total authorized capital stock was $400,000,000, divided into 4,000,000 shares of the par value of $100 each. The amount of the capital stock with which the corporation could commence business was fixed at $30,000. Its duration was to be perpetual; and its objects were certified to be, *inter alia*, as follows:

> "(1) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey or of any other State, Territory or country.
>
> (2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner thereof, to exercise all the rights, powers and privileges of ownership.
>
> (3) To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country; and while owner of such stock, to exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

The Securities Company was promptly organized in pursuance of its certificate of incorporation, from which the foregoing clauses have been extracted, and very shortly thereafter, the "associate stockholders" of the Great Northern Railway Company transferred to the Securities Company a controlling interest in the capital stock of the Great Northern Railway Company upon an agreed basis of exchange of $180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and the associate stockholders of the Northern Pacific Railway Company assigned and transferred to the Northern Securities Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of $115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company. For the stock of these railway companies, whether transferred as above stated, or subsequently acquired upon the same basis, and also for about $7,522,000 paid to it in cash, the Securities Company issued its stock certificates in the following form:

"AUTHORIZED CAPITAL STOCK, $400,000,000.

No..... .....Shares

NORTHERN SECURITIES COMPANY

INCORPORATED AND REGISTERED UNDER THE LAWS OF THE STATE OF NEW JERSEY.

This Certifies that ..... is the registered holder of ..... Shares of the Capital stock of the Northern Securities Company of One hundred dollars each, transferable only on the books of the company by the holder hereof, in person or by

duly authorized attorney, upon surrender of this certificate.

This certificate shall not become valid until countersigned by the transfer agent and also by the registrar of transfers.

In testimony whereof, the said company has caused this certificate to be signed by its President and Treasurer this ..... day of ....., A. D. 190...

.....
President.

.....,
Treasurer.

Countersigned this .... day of ...., A. D. 190...

.....,
Transfer Agent.

Countersigned and Registered this ..... day of ....., A. D. 190...

MANHATTAN TRUST COMPANY,
Registrar of Transfers.

By .....,
Secretary.

Shares, $100 each."

In March, 1902, a bill was exhibited by the United States, in the Circuit Court for the District of Minnesota, against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont. The object of this bill was to restrain the violation of the Act of Congress of July 2, 1890, 26 Stat. c. 647, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies"; and the suit which it originated was so proceeded

with that in April, 1903, the said Circuit Court adjudged and decreed—

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that all the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States; that the Northern Securities Company, its officers, agents, servants, and employees, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the North-

ern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. . . . "

Upon March 14, 1904, this decree was affirmed by the Supreme Court of the United States (193 U. S. 197), and thereupon, viz., on March 22, 1904, the Board of Directors of the Securities Company adopted the following preamble and resolutions:

"WHEREAS, In the course of its business, this Company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

WHEREAS, In a suit brought by the United States against this Company, the said railway companies and others, this Company has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this Company any dividends upon any of the shares of such railway company held by this Company; and

WHEREAS, This Company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

WHEREAS, This Company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay;

RESOLVED, In consideration of the premises, it is declared necessary and desirable for this Company so to reduce its present stock as will enable it,

without delay, in connection with such reduction, to distribute among its shareholders the shares of capital stock of said railroad companies held by it.

RESOLVED, That the Board of Directors of this Company hereby declares it advisable that Article (4th) of this Company's Certificate of Incorporation be amended, so as to read as follows:

FOURTH.—The capital stock of this Company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this Company's stock surrendering to the Company, for retirement ninety-nine (99) per centum of the shares held by him.

Upon the surrender to this Company, by any shareholder, of the entire number of shares and parts of shares of this Company stock, which he is hereby required to surrender, this Company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof, for fractional shares of the stock of this Company.

The Board of Directors or Executive Committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this Company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the Board. For the purposes hereof, the stockholders of this Company, and the num-

ber of shares held by them, respectively, shall be determined from the stock transfer books of the Company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the Board.

Resolved, That a meeting of the stockholders of this Company, for the purpose of taking action upon the said alteration of the Certificate of Incorporation of this Company, and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this Company in the City of Hoboken, County of Hudson and State of New Jersey, at 11 o'clock A. M., on April 21, A. D. 1904."

Notice of a meeting of the stockholders of the Securities Company was accordingly given, and such meeting was duly held upon April 21, 1904. At that meeting the stock of the Company was reduced ninety-nine per centum, and the proposed *pro rata* distribution of the stock of the Northern Pacific Railway Company, and of the preferred stock of the Great Northern Railway Company, to and amongst the shareholders of the Securities Company was assented to. This was followed by the institution of the present suit, wherein the complainants allege " that the defendant Northern Securities Company threatens and intends to distribute the shares of stock of each of said Great Northern and Northern Pacific Railway Companies *pro rata* among its stockholders in disregard of the rights of your orators, and that if said defendant Northern Securities Company be not enjoined from so doing by this court, such distribution will be forthwith made, and the stock of the Northern Pacific Railway Company belonging to your orators, and to which they are entitled,

will be lost to your orators." The bill accordingly prayed for an injunction, and thereupon, and on affidavits and exhibits, the injunction now in question was awarded.

The appellees averred in their bill, and their counsel have contended in argument, that the shares of railway stock in question were acquired by the Securities Company under and subject to an alleged agreement (which will be presently more particularly referred to) that it would hold them "as custodian, depositary, or trustee"; and that the "legal and equitable owners of said shares of stock of said railway companies were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns." On the other hand, the appellant, the Securities Company, insists that it acquired the railway shares referred to by absolute purchase thereof, and that consequently it became and now is vested with the equitable as well as the legal title thereto. The issue thus presented is of primary importance, and the proofs leave us in no doubt as to the facts upon which it must be determined. That the transaction, at least in form, and *prima facie* in substance, was one of purchase and sale is manifest. The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company, was adopted by its Board of Directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was "to purchase said stock . . . at an aggregate price of $91,407,500, payable as to $82,491,871 thereof in the

fully paid up and non-assessable shares of the capital stock of this Company at par, and as to $8,915,629 in cash." It is obvious that this resolution contemplated a "purchase," and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company; the price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock for which corporate certificates in the ordinary form were delivered and accepted. The cash so paid, which amounted to about $7,522,000, was (as is stated in the bill) "used for the purchase of other property and for corporate purposes"; the complainants received dividends upon the stock that was issued to them, which was paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York, the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock, which it thereby pledged. It is claimed, however, that notwithstanding these facts, the beneficial interest in the railway stock was not transferred to the Securities Company, because, as the appellees allege, the transfer was made under the terms of an agreement which they say was made by James J. Hill, J. Pierpont Morgan, and others, owning or controlling a majority of the capital stock of the Great Northern Railway Company, and a majority of the com-

mon stock of the Northern Pacific Railway Company, "to organize a holding company . . . and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operations and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company"; and that "in pursuance of said agreement said Northern Securities Company was organized . . . and forthwith agreed to acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depositary, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required, whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale, and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan and Company to dispose of the Northern Pacific stock held by the Oregon Short Line Company, and that "they further stated that upon the organization of the proposed holding company"—not that it would take as custodian or trustee, but that

"they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line and to pay therefor in the stock of the holding company." These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by the other evidence, make it quite impossible to believe that the railway stock was received by the Securities Company merely as a custodian or depositary. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily abandoned has not divested or in any way affected the absolute title which by executed contract of purchase it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and, admittedly, that payment was made. The situation, then, is this: The Northern Securities Company is the owner of 1,537,594 shares of the stock of the Northern Pacific Railway Company, and 1,181,242 shares of the stock of the Great Northern Railway Company, which it has been restrained, at the suit of the United States, from voting or receiving dividends upon, and, in view of this restraint, all parties agree that it should not con-

tinue to hold them. It accordingly proposes to assign them *pro rata* to its shareholders, including not less than 2,500 persons whose shares were unquestionably acquired by purchase, and who are not parties to this suit; and as such disposition of them would effect a ratable, and therefore equitable, division of them amongst all who are entitled to participate in a distribution of the corporate assets, we are of opinion that the injunction which prohibited it should no longer remain in force.

If the question before us had been involved and decided in the suit of the *United States* v. *The Northern Securities Company*, or if it had been passed upon, though but incidentally, by the Supreme Court of the United States in disposing of the appeal in that case, we of course would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation. The petition or bill of the United States did pray, *inter alia*, that the stockholders of the railroad companies who had exchanged their stock therein for stock of the Northern Securities Company should be required to surrender any stock of the Northern Securities Company so acquired and held by them, and to accept therefor the railway stock "in exchange for which the same was issued"; but the decree, in so far as it was mandatory, went no further than to prohibit the doing of "the specific things which being done would effect the result denounced by the act." 193 U. S. 356. This was all that was requisite, and it was accomplished by that part of the decree which has been already quoted; and the added

clause, though apparently suggested by the prayer of the bill to which we have referred, was obviously not intended to have any obligatory effect. It was permissive merely, and this so plainly appears from its terms that it is necessary only to direct attention to them. They are:

> "But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignment of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

This decree was affirmed in its entirety and without modification, and thereafter the three principal complainants in the present case applied to the Circuit Court for the District of Minnesota for leave to intervene in the suit in which it had been made. The ground of that application was substantially the same as that upon which this bill is founded; but, in denying it, the court said:

> "The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement

is deemed essential. In its bill of complaint, the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The Court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the court otherwise than by representation (if indeed they were present by representation) to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time. . . . It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be returned or exclude other methods of disposing of it that, in view of all the circumstances,

might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

The facts which have been mentioned negative the contention that the question here in dispute was adjudicated in the Government suit, and the further contention that it was at least authoritatively dealt with in the principal opinion rendered upon the appeal in that case, is, we think, likewise fallacious. Some phrases in that opinion, if considered separately and without reference to the precise subject which was under investigation, may seem to sanction the interpretation which the appellees have sought to put upon it; but when it is read as a whole, it becomes quite evident that it was not intended to resolve any question other than that which was before the court. The decree that was under review had enjoined the Securities Company from using the railway shares in furtherance of the scheme declared to be unlawful, but, as we have seen, the right of property in those shares was not at all affected by that decree. "The Circuit Court has done only what the actual situation demanded. Its decree has done

nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose." 193 U. S. 357. We have been asked to infer from this statement in the opinion, that the learned justice who made it intended to affirm that the property interests of the original holders of the railway shares had not been transmuted by their assignment; but no such inference would be warranted. He was not dealing with conflicting claims of title, but with the decree of the Circuit Court, and the plain and natural meaning of the language he used is, that *by that decree* no property interests had been disturbed. As was stated by the learned judges who made it—

> "When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able and likewise disposed to make some disposition of the stock which under all the circumstances of the case would be fair and just and would restore it to the markets of the world where it would have some value instead of being a worthless com-

> modity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested."

The present suit is an independent one, and as its subject matter is distinctly different from that of the suit in which the United States was complainant, the duty of this court to independently consider it has seemed to us to be both plain and imperative.

The conclusion reached upon the questions we have discussed render it unnecessary for us to express any opinion upon the other points argued by counsel. From what has been said it follows that the decree of the Circuit Court must be reversed, and therefore it is so ordered.

GRAY, J., dissenting:

I am constrained to dissent from the judgment of the majority of the court. I do not think the learned judge of the court below exercised other than a sound judicial discretion in granting the motion for a special injunction, *pendente lite*. He has stated in his opinion that important and doubtful questions of law and fact had been raised by the pleadings and affidavits, and I cannot agree that these questions should have been so determined by him on a motion for a preliminary injunction, as to make necessary the dismissal of the bill. I say, to make necessary the dismissal of the

bill, because it is apparent that, to have denied the injunction *pendente lite*, and thus to have permitted the distribution of the stocks of the Northern Pacific and Great Northern, in the custody and control of the defendant company, according to the plan proposed, would have practically frustrated the object of the suit, and have rendered unavailing a decree as prayed for, in favor of complainants. Nothing but a clear conviction that complainants' bill was without equity, and should therefore be dismissed without further hearing, would have justified the court below in refusing the preliminary injunction. On the other hand, if the court were satisfied that a *prima facie* case had been presented by complainants, and that the balance of advantage or disadvantage to result to the parties respectively from the granting or withholding an injunction was such as to sanction such action, it was the exercise of a sound judicial discretion to grant the injunction and preserve the *status quo*, until there was opportunity, after full hearing, in the ordinary progress of the suit, to consider, with the deliberation they demanded, the questions of law and fact raised by the pleadings and evidence in the case. The responsibility for the exercise of this power and duty rested upon the court below.

Upon appeal from an order granting a preliminary injunction a reviewing court is not called upon, ordinarily, to enter into and decide the merits of the case, and unless the court below, in granting the preliminary injunction, has violated some rule of equity or abused its discretion, or acted improvidently, this court

should not interfere with its discharge of the responsibility and duty imposed upon it. "The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is, not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the wide latitude permitted them, and violated the rules of law which should have guided their action." That there was no such abuse of discretion in this case by the learned judge of the court below, will, I think, be apparent from his own statement, and from the admission made to that effect by the majority of the court. It seems to me clear that he should be afforded the untrammeled opportunity he sought, for a full hearing and deliberate investigation of what he has stated to be the important and doubtful questions of law and fact presented by this record. Such a course would be consonant with the genius of our judicial system, by not depriving the parties or a reviewing court of the benefit to result from the examination and judgment of a court of first instance. This salutary feature of our system would be measurably lost, if the right to appeal from an interlocutory decree for a special injunction, given by the Act of Congress, should be so construed as to allow courts of first instance to refer, and the appellate courts to assume, the determination of questions arising on motions for such injunctions. I cannot accept the view that it is our duty in the case at bar to do more than merely determine whether the

sound judicial discretion of the court below has or has not been abused, declining to consider what ought to be the decision on the merits at final hearing. I do not think that the established general rule of appellate courts requires more than this; and I think we can conform to this general rule, "without in effect renouncing the appellate jurisdiction conferred upon us by Congress."

As I am clearly of the opinion that the court below, in granting the special injunction *pendente lite*, has given due consideration and effect to the balance of inconvenience and injury which may result to one person or the other, and that the *prima facie* case was sufficiently established at the hearing to entitle the complainants to the protection of such an injunction, I am in favor of affirming the interlocutory decree.

Filed January 3, 1905.

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No. 512.

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JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

No. OCTOBER TERM, 1905.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, THE OREGON SHORT LINE RAILROAD COMPANY and the EQUITABLE TRUST COMPANY OF NEW YORK, Appellees below and Petitioners,

vs.

NORTHERN SECURITIES COMPANY, Appellants below and Respondents.

Brief in Support of Petition for Writ of Certiorari.

D. T. WATSON,
Attorney for Petitioners.

Smith Bros. Co., Franklin Print, 625 Grant Street, Pittsburg, Pa.

The purpose of this Brief is to show that the Court of Appeals (Judges Acheson and Dallas assenting and Gray dissenting) erred in—

(1) Holding that this Court did *not* in the case of the Northern Securities Company vs. the United States, 193 U. S. 197, either decide or incidentally pass upon the question—
Was the Northern Securities Company the purchaser and real substantial owner of the stocks of the Northern Pacific and Great Northern Railroad Companies, or did it hold them merely as custodian?

(2) Holding that a proposed *pro rata* distribution by the Northern Securities Company of said railroad stocks among all its stockholders necessarily based by that Court on the Securities Company being the real substantial owner of the same is not inconsistent with the findings of fact and decree of this Court in the above cited case.

(3) Holding that on an appeal from an interlocutory order granting a preliminary injunction where the hearing below was on bill and *ex parte* affidavits, it could (as it did) practically finally decide the case by a finding of facts contrary to the averments of our bill, disregarding other important questions of fact and of law, and though it held the Circuit Court had not abused its discretion, nevertheless reversing its order.

To this we add as we did below—

(IV) Your petitioners are in their own right, as parties by representation in said case, entitled to set up and plead the findings of facts and conclusions and decree of this Court in that case as conclusive between themselves and the Northern Securities Company in this case.

IN THE

Supreme Court of the United States.

No. **OCTOBER TERM, 1905.**

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, THE OREGON SHORT LINE RAILROAD COMPANY and the EQUITABLE TRUST COMPANY OF NEW YORK, Appellees below and Petitioners,

vs.

NORTHERN SECURITIES COMPANY, and NORTHERN PACIFIC RAILWAY COMPANY, Appellants below and Respondents.

In the Matter of the Petition of Edward H. Harriman, Winslow S. Pierce, The Oregon Short Line Railroad Company and the Equitable Trust Company of New York, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

We assert and aver our ability to prove that this court in the case of *The United States vs. The Northern Securities Company*, 193 U. S. 197, hereinafter called the Government Case, among other things decided—

(1)—That the Northern Securities Company was *not* the real purchaser or absolute owner of the stocks of the Northern Pacific and Great Northern Railroad Companies, (including the stock of your petitioners,) but took them as mere custodian for the railway stockholders.

(2)—That the Northern Securities Company was created by, and became the mere agent of, Messrs. Hill, Morgan and others, who organized a combination against commerce which this court decided to be illegal, and all said railroad stocks were assigned to it in furtherance of, and as a means necessary to, carry out the purposes of the combination.

(3) Your decree, read in the light of your opinion, followed logically your finding of facts. It deprived the Northern Securities Company of the right to vote or collect dividends on said stock, and tied up and rendered unmarketable said stocks in the possession of the Northern Securities Company, and then in furtherance of the power you declared you possessed to make any order necessary to dissolve the combination, you, by your decree, provided for the undoing of what had been done and authorized the return to the separate persons of the identical stock which each had assigned to the Northern Securities Company, and thus you decreed one, and only one mode of disposing of said railroad stocks. This mode was necessarily exclusive of any other, and especially of the one now proposed, for the one now proposed necessarily affirms that the Northern Securities Company was the real purchaser and absolute owner of the railroad stocks, and without this affirmance it could not make the distribution.

The Court of Appeals, (Judges Acheson and Dallas assenting, Gray dissenting,) decided this case wholly uninfluenced by, and contrary to this prior decision and decree of this court in that Government case. Their decision was in effect and was intended to be final. The Court, Judge Dallas, said that

> "Whether the injunction should stand or be dissolved ought in our judgment to be determined upon the merits and without further delay. * * *

* * We think that reason and justice demand that such an adjudication shall not further be postponed."

They thereupon proceeded to, and did dispose of what they thought were the merits of the controversy, though they overlooked material questions of fact and of law in the case.

Instead of following that decision and decree of this court, the Court of Appeals held, and on the same evidence, which was before this Court (see our petition), that the Northern Securities Company was the real purchaser and substantial owner of the said stocks; that it therefore might make a distribution of the same different from, and inconsistent with, the one authorized by this court, and necessarily based upon a disregard of your decree and finding of facts:

That we do not overstate the situation, we show by the following language of the majority opinion:

Judge Dallas said:

"If the question before us had been involved and "decided in the suit of the *United States vs. The* "*Northern Securities Company*, or if it had been passed "upon,

though but incidentally,

"by the Supreme Court of the United States in dispos- "ing of the appeal in that case, we of course would "not regard it as an open one. But it was neither "decided nor considered at any stage of that litiga- "tion."

* * * * *

"The present suit is an *independent one*, and as its "subject matter is distinctly different from that of the "suit in which the United States was complainant, the "duty of this Court *to independently consider* it has "seemed to us to be both plain and imperative,

If the court erred, in so disregarding the opinion and decree of this court, we are entitled, we respectfully urge, to such action by this court as will enforce your own opinion and decree. Even if there was a question as to the meaning of your opinion and decree, we respectfully urge we are entitled to have *this* court pass upon and determine that question *itself:* we are especially entitled to a supervision by this court, because the Court of Appeals declined to be controlled by the plain language used by this court in reaching and stating its conclusions. We respectfully insist that once this court has acted the lower court can only follow what this court has decided, and that your opinion and decrees are not to be modified or minimized by the lower court.

We were by representation parties to the Government Case; were bound by, and are entitled to the benefits of your opinion and decree whenever in any subsequent litigation the same question arises between those who were parties to that case. In the case at bar one of the same questions passed upon in that case does arise and between two of the same persons, *i. e.*, the Northern Securities Company and your petitioners. We are legally and equitably entitled as of and in our own right to set up and plead and insist upon the finality of that decree.

The present proposed distribution sanctioned by the Court of Appeals affirms the legality of the acquisition by the Northern Securities Company of all this railroad stock, the very claim which the Northern Securities Company unsuccessfully made in this Court in the Government case. The proposed distributees of the Northern Securities Company will acquire a title solely through the Northern Securities Company to these railroad stocks, and that title, the Court of Appeals has held, will be good, though it was acquired in pursuance of, and to carry out, a combination to restrain trade and commerce which this Court denounced as illegal; this distribution will vest

the control of the stocks of the two railroad companies in the hands of the stockholders of the Northern Securities Company and will create, if not continue, a situation by which the control of both these competitive roads is put into the hands of the same persons to prevent which the Government suit was instituted.

Instead of disaffirming and dissolving the combination by the undoing of what was done, and returning to the persons the identical stock which each had assigned to the Northern Securities Company, it *affirms* that portion and the most material portion of the combination, *i. e.* its acquisition of the railroad stocks, and does this, we respectfully urge, in plain disregard of your opinion and decree.

The Court of Appeals also, we submit, contrary to the decisions of this court, on an appeal from an interlocutory decree granting a preliminary injunction where the hearing in the Circuit Court was on Bill and *ex parte* affidavits, practically finally decided the case and thus deprived us of our right to go to the final hearing and cross examine witnesses and compel the attendance of hostile witnesses, though there were disputed questions of fact in the case.

To reach their conclusion the Court of Appeals passed upon questions of fact and found them contrary to the allegations of the bill which had been neither answered nor demurred to: though the Court of Appeals found the discretion of the circuit judge in granting the injunction had not been abused, yet it reversed his order and practically finally disposed of the case, as if it were a court of original and not one of appellate jurisdiction: the conclusions in the court below are reached only by two judges, Circuit Judge Acheson and Circuit Judge Dallas, while Circuit Judge Gray dissents from this action, District Judge Bradford who sat

and heard the motion, granted the injunction and justified his action by a lengthy opinion, and the late District Judge Kirkpatrick heard the application originally and granted the injunction though without argument.

[This difference of itself seems to be proper ground for a *certiorari*. *Forsythe vs. Hammond*, 166 U. S. 512.]

FIRST. When this court affirmed the St. Louis decree in the case of the *Northern Securities Company vs. The United States*, 193 U. S., 197, (hereinafter called the Government Case), that decree became the decree of this court and was to be and is to be read only in the light of the opinion of this court, and if a controversy arises as to its meaning, this court alone can and must settle the same.

In *Durant vs. Essex County*, 101 U. S., 555, you said:

"On a mandate from this court affirming a decree the Circuit Court can only require our order and proceed with the execution of its own decree as affirmed. *It has no power to rescind or modify what we have established.* Our judgment by a divided court is just as as much our judgment for all the purposes of the case in hand as if it had been unanimous. The result of the appeal to us was an affirmance of what had been done below.

After the appeal had been taken the power of the court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down."

In *Sandford Fork & Tool Co.*, Petitioner 160, U. S. 247:

"When a case has been once decided by this Court on appeal and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree is

considered as finally settled. The Circuit Court is bound by the decree as the law of the case and must carry it into execution according to the mandate. That Court cannot *vary it* or *examine it for any other purpose* than execution, or give *any other* or *further relief* or review it even for apparent error upon any matter decided on appeal; or *intermeddle* with it further than to settle so much as has been remanded. * * * * *The opinion delivered by this Court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and* * * * * *it is for this Court to construe its own mandate and to act accordingly.*"

This was cited and approved *In re Potts*, 166 U. S. 265.

If there be a controversy over the meaning of your mandate and decree that is to be settled by the opinion

"delivered by this court at the time of rendering its decree,"

If your mandate and decree needs construction, it must be

"for this court to construe its own mandate."

If the plain meaning of the plain words used by this court are to be departed from, it cannot be that any authority less than this court can authorize that

To permit a construction by the lower Court which disregards and renders nugatory the plain language of your opinion, which finds the essential facts in controversy directly contrary to the finding of this court, and then approves of a mode of action by the defendant in disregard of, and different from that pointed out by you, is to substitute the judgment of the lower court for your own and destroy the supremacy of this, the highest court in the land.

As was said in *Durant vs. Essex County*, 101 U. S. 555, the Circuit Court

"* * * has no power to rescind or modify what we have established,"

not even if as you said *supra*, there is

"apparent error"

in our decision.

SECOND. This court in the Government case did on issue plainly joined, plainly decide, (and below we use the words of this court) that the title which the Northern Securities Company took to *all* the stocks, including your petitioners', which it acquired of the Northern Pacific and Great Northern Railroad Companies, was

"not as a real purchaser or absolute owner, but simply as custodian.

"There was no actual investment in any substantial sense by the Northern Securities Company in the stock of the two constituent companies. If it was in form such a transaction, it was not in fact one of that kind."

The opinion of this court (Mr. Justice Harlan) is quite at length and necessarily covered many questions, but it distinctly and at length discussed and decided the question, Was the Northern Securities Company a real purchaser of, and did it acquire a substantial *bona fide* title to, the stocks of the Northern Pacific and Great Northern Railroad Companies?

Not pretending to quote at great length from that opinion, we refer to those portions which the more strikingly show how this court decided that question:

Mr. Justice Harlan said:

(Pages 325, 325.)

"*Summarizing the principal facts*, it is indisputable upon this record that under the leadership of the

defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized.

"as the *holding corporation* through which the scheme should be executed; and under that scheme such *holding* corporation has become the holder—*more properly speaking, the custodian*—

"of more than nine-tenths of the stock of the Northern Pacific and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation.

(Page 333.)

"It is said that whatever may be the power of a State over such subjects Congress cannot forbid single individuals from disposing of their stock in a State corporation, even if such corporation is engaged in inter state and international commerce;

"that the holding or purchase by a State corporation, or the purchase by individuals, of the stock of another corporation, for whatever purpose, are matters in respect of which Congress has no authority under the Constitution;

"that, so far as the power of Congress is concerned, citizens of State corporations may dispose of their property and invest their money in any way they choose;

"and that in regard to all such matters, citizens and State corporations are subject, if to any authority, only to the lawful authority of the State in which such citizens reside, or under whose laws such corporations are organized.

"*It is unnecessary in this case to consider such abstract, general questions. The Court need not now concern itself with them. They are not here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination.*

* * * * * *

(Page 335.)

"What the Government particularly complains of, indeed, all that it complains of here is the existence *of a combination* among the stockholders of competing railroad companies which in violation of the Act of Congress, restrains interstate and international commerce *through the agency of a common corporate trustee* designated to act for both companies in repressing free competition between them."

* * * * *

(Page 346.)

"But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that Company in its capacity as a *holding corporation and trustee* from carrying out the *purpose of a combination* formed in restraint of interstate commerce.

"The Securities Company is itself a part of the present combination; its head and front; *its trustee.*

* * * * * *

(Pages 353, 354.)

It is said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies

> "imported simply an investment in the stock of other corporations, a purchase of that stock, which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress.
>
> "*This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment in any substantial sense*, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was, *not, in fact*, one of that kind.
>
> "However that company may have acquired for itself any stock in the Great Northern and the Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was *acquired and held* to be used in suppressing competition between those companies. *It came into existence only for that purpose. If any one had full* knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan.
>
> "*In his testimony he was asked, 'Why put the stock of both these (constituent companies) into one holding company?' He frankly answered. In the first place, this holding company was simply a question of custodian because it had no other alliance.' That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a holding company in whose hands, not as a real purchaser or absolute owner, but simply as*

custodian were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, * * *

Mr. Justice Brewer showed his concurrence in this finding of the fact by agreeing to the decree and by saying that the Northern Securities Company

"was a mere instrumentality by which separate railroad properties were combined under one control.

- - The transfer of the stocks to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain commerce was carried out."

Mr. Justice White certainly understood the case involved the determination of the question, was the Northern Securities Company the real purchaser of the railroad stocks, for he said :

"It is said first that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the real owner of the stock in the railroads since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads."

(III) This Court followed this finding of fact by reciting the words of the decree (see pages 354, 355, 356):

You then said: (356.)

"No valid objection can be made to the decree below in form or substance." * * *

(357, 358.)

"*The decree if executed will destroy not the property interests of the original stockholders of the con-*

stituent Companies, but the powers of the holding corporation as the instrument of an illegal combination of which it was the master spirit to do that which if done would restrain inter state and inter national commerce."

And you concluded your opinion as follows:

(360). "The judgment of the Court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the executing of its decree as the circumstances may require."

You thus deduced and followed the logical and necessary results from your finding of facts.

If it was true as you found it was:

That the Northern Securities Company was *not* the real purchaser of the railroad stocks, but merely and only the agent of the railway shareholders, their trustee, their custodian, to take and permanently hold these stocks and thus in a common interest manage both railroads: That

"All of the stock of the Northern Pacific Railroad "Company and all the stock of the Great Northern "Railway Company now *claimed* to be held and owned "by the defendant the Northern Securities Company "was acquired and is now held by it in virtue of such "combination or conspiracy in restraint of trade and com- "merce among the several states."

That you then virtually tied up and rendered useless in the possession of the Northern Securities Company all of said railroad stocks by depriving them of the voting power and the power of drawing dividends and thus the Northern Securities Co. became literally the mere holder of the same but without the rights of an owner of the same:

You then had before you a condition where these huge blocks of railroad stocks were worthless in the treasury of the Securities Company.

You had already in your opinion decided:

(346) "In short, the Court may make any order neces-
"sary to bring about the *dissolution* or suppres-
"sion of an illegal combination that restrains
"interstate commerce."

And that

(360) "the Court, in virtue of a well settled rule gov-
erning proceedings in equity, may mould its
decree so as to accomplish practical results—
such results as law and justice demand."

And you then—authorized the undoing of what had been done—struck the final blow at the combination—utterly dissolved it and broke it up by disintegration and resolved it into its original elements.

And you pointedly and exclusively pointed out the sole way that (the entire dissolution) could be accomplished by the Securities Co. returning to the original assignors the railroad stocks they assigned to it.

You permitted no other way—

This was the sole way you pointed out.

Under your findings of fact hereinbefore recited you could not have authorized a way which would be based upon and resulted from the proposition, (and which necessarily required such basis), *i. e.*,

That the Northern Securities Company *was* the purchaser and thus the real unconditioned owner of the railroad stocks.

By authorizing as you did that these railroad stocks might be returned to the original assignors you thereby necessarily determined that these original assignors were in equity and good faith the owners of such shares, and that the mere holding of a certificate in the Northern Securities Company did *not* give its holder any interest in any other railroad stock than he or his assignor had assigned.

In authorizing this particular way you of necessity denied any other way—especially any other way which was based upon a contradiction of the facts you had found.

With extreme care in your opinion and decree you always—always—and as to all parts disaffirmed the unlawful combination and all its acts.

None of them was or could be legal. They were all tainted with the illegal purpose.

You were careful not to authorize that which would affirm the validity of any act by the combination; and this extended to and embraced the acquisition by the Northern Securities Co. of all the railroad stocks. In your view such acquisition was illegal. The law denounced it. You necessarily held, and you held it both as a question of fact and of law, that a good title with the elements of ownership did not pass to the Securities Co.

You could not and did not either directly or by indirection sanction or even "wink at" any plan of dissolving the Northern Securities Co. which necessarily assumed that the Northern Securities Co. acquired a real substantial title as purchaser to said railroad stocks.

(IV.) *What did this Court decide in the Government case?* It may be succintly stated as follows:

(1) You outlined the combination against commerce; found that it suggested, organized and assigned to the Northern Securities Co. the railroad stocks (including that of your petitioners) and thus enabled it to destroy competition and you denounced it as illegal.

(2) You hold that all of said railroad stocks
"Now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or con-

spiracy in restraint of trade and commerce among the States."

(3) That the mode—indeed the only mode—in which the combination was carried out was the acquisition by the Northern Securities Co. of the railroad stocks. How that Company acquired these stocks and what its title to these stocks was the pleadings raised and this Court at length discussed and decided. It was raised in the pleadings in the government case and was hotly controverted and argued in this Court. It was in this Court decided to be a material, indeed a controlling question duly put in issue.

(4) The Northern Securities Co. here asserted that it was the *bona fide* purchaser for value and took an absolute title to these railroad stocks and this the Government denied.

This Court (*see our quotations ante*) held the Northern Securities Co. was not the *purchaser* of the railroad stocks and did not become the absolute owner thereof:

In part your words were:

"There was no actual investment in any substantial sense by the Northern Securities Company in the stock of the two constituent companies. If it was in form such a transaction, it was not in fact one of that kind."

Referring to Mr. Morgan's testimony, you said:

"That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a holding company in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies."

(5) Seeing this situation and having determined your own power to make any order necessary to accomplish the dissolution of this combination you then added to your decree:

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company, and the Great Northern Railway Company, respectively, any and all shares of stock of either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

This is the one and only one method you authorized for the distribution by the Northern Securities Co. of this railroad stock.

It was the natural and ordinary method and comported with your own findings of fact and did exact justice to all parties—*i. e.*—gave back to each that which he had put in. Entirely dissolved and destroyed the unlawful combination by disintegrating and separating the two railroad stocks which had been put into the possession of one Company. In no way did you sanction the proposition that the Securities Co. *lawfully* acquired the railroad stocks. You had determined to the contrary and to that you adhered. You authorized the Northern Securities Co. to reassign the identical railroad stocks, either Northern Pacific or Great Northern, to the

identical persons who assigned the same to the Securities Co. or to the assignee of such person. Thereby these persons did not *acquire title* from the Securities Co., but as the *cesteri que trustents* they were then the real beneficial owners and the decree allowing the reassigning merely struck down what had been done as part of the conspiracy, *i. e.*, placing the stocks in its hands as custodian, and relieved the stock when handed back to its original assignors from the disabilities it incurred in the hands of the Securities Co., *i. e.*, the denial of the right to vote and collect dividends.

(6)—You then said that

> "The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit to do that which, if done, would restrain inter-state and inter-national commerce."

If the Northern Securities Company had been the real, absolute owner, as is now claimed, of the railroad stocks, then the decree of the court in the Government case depriving it of the rights of ownership in the stock, *i. e*, to vote or collect dividends on the same, would have

"destroyed"

property interests.

Because the Northern Securities Company was not such real, absolute owner, but simply the holder for an illegal purpose, the decree when executed would not

> "destroy the property interests of the original stockholders of the constituent companies,"

because it took from the agent merely the right to vote and collect dividends, which powers it illegally had assumed to accomplish an illegal purpose, and restored them to the original owners of the railroad stocks.

(7)—You then made the following order:

> "The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require."

Why was this liberty to the Circuit Court given

> "to proceed in the execution of the decree,"

if, as it is now claimed, the decree is wholly prohibitory and executes itself?

That this court contemplated at least the possibility of the necessity of the Circuit Court making orders to enforce the decree as a whole is obvious, and it is respectfully submitted that this emphasizes what is to be gathered from the opinion and the entire decree of this court, and that is,

> That under the decree of this court, read in the light of the opinion of this court, there is but one possible way consistent with that decree and opinion for the Northern Securities Company to distribute its railroad stocks, and that is by a re-assignment of the same to the original persons or their assignees who assigned the respective railroad stocks to the Northern Securities Company.

If it be asked why this court did not make mandatory that portion of the decree in reference to the return of the railroad stocks, the answer is obvious: Why should it make it mandatory?

(V.) The Northern Securities Co., avowing in words its intention to follow and obey this decision and decree of this Court in the Government case, by its deeds, proposes to distribute its stocks—not by returning them to the original assignors as this Court alone authorized—but by distributing them pro rata among all the stockholders of the

Northern Securities Co., on the theory that the Securities Co. was the purchaser and owner of all said railroad stocks.

This suit was then brought in the Circuit Court of New Jersey to prevent such distribution and compel the assignment to Complainants of all the Northern Pacific stock it had assigned to the Securities Co.

The Circuit Court on Complainant's motion granted a preliminary injunction until final hearing, on the Bill and Exparte affidavits pro and con and after argument and from this interlocutory decree the Northern Securities Co., appealed to the Circuit Court of Appeals.

That Court, turning to our disadvantage the preliminary into a final hearing, held that the main question in this case was:

> Did the Northern Securities Co. acquire the stock by purchase and own it outright, or did it hold it as custodian or trustee?

And the Court of Appeals then said:

> "If the question before us had been involved and decided in the suit of the *United States vs. the Northern Securities Company*, or if it had been passed upon
>
> *though but incidentally*
>
> by the Supreme Court of the United States in disposing of the appeal in that case, we, of course, would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation."

On the same testimony before *this* court in the Government case, including Mr. Harriman (see petition) the Court of Appeals then proceeds to find and did find that the Northern Securities Company was a purchaser for value and absolute owner of all said rail-

road stocks, directly to the contrary of the findings of this court as hereinbefore shown.

In answer to our urging that even if the Court of Appeals doubted whether the decision of this court was *res adjudicata* settling the present controversy, still undoubtedly this court had on the same testimony expressed an opinion and respect for this court should at least prevent the Court of Appeals from brushing aside on a preliminary motion and in a manner fatal to us this august authority upon which we then thought and now think we could and can confidently rely. The Court of Appeals said:

> "The facts which have been mentioned negative the "contention that the question here in dispute was adju- "dicated in the Government suit, and the further con- "tention that it was at least authoritatively dealt with in "the principal opinion rendered upon the appeal in that "case is, we think, likewise fallacious. *Some phrases* "*in that* opinion, if considered separately and without "reference to the precise subject which was under inves- "tigation, may seem to sanction the interpretation which "the appellees have sought to put upon it; but when it "is read as a whole, it becomes quite evident that it was "not intended to resolve any question other than that "which was before the court."

Here you have this result:

This Court decided in the government case that the question whether the Northern Securities Co. was the *bona fide* purchaser of the identical railroad stocks involved in this case and absolutely owned them was an important question for its decision.

Mr. Justice Harlan delivering the opinion of the Court so said as we have shown by our citations supra.

Mr. Justice Brewer in effect so says.

Mr. Justice White speaking for himself and the Chief Justice and Mr. Justice Peckham in effect so stated.

The Court of Appeals by a mere majority opinion brushes aside the decision of this court by simply saying that though some of your language might seem to say so, you did not mean it; that even "*incidentally*" you did not pass upon that question.

The Court of Appeals did not even refer the question to you of what you meant. It determines you meant much less than, and therefore contrary to, what you said.

This court said when such a position arises, *i. e.* that there is any doubt of what you meant by your decree, that it must of necessity pass upon it *itself.*

This is what we ask.

What this Court did in its own language say.

And how the Court of Appeals construes it is shown by parallel columns.

Supreme Court of United States.	**Circuit Court of Appeals.**
"It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported	"If the question before us had been involved and decided in the suit of the *United States vs. The Northern Securities Company*, or if it had been passed upon, though but *incidentally*, by the Supreme Court of the United States in disposing of the appeal in that case, we of course would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation."
"simply an investment in the stock of other corporations, a purchase of that stock,—which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. *This view is wholly fallacious and does not comport with the actual trans-*	

actions. There was no actual investment in any substantial sense by the Northern Securities Company in the stock of the two constituent companies. *If it was in form such a transaction, it was not in fact one of that kind.* However that company may have acquired for itself any stock in the Great Northern and Pacific Railroad Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between these companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished and as to what was actually accomplished by the combination in question, it was the defendant Morgan. In his testimony he was asked—

'Why put the stock of both these (constituent companies) into one holding company?'

"He frankly answered:
'In the first place this holding company was simply a question of custodian because it had no other alliances.'

"That disclosed the actual nature of the transaction which was only to organize the Northern Securities Company as a holding company in whose hands *not* as a real purchaser or absolute owner, but *simply* as custodian were to be placed the stocks of the constituent companies, — such custodian to represent the combination formed between the shareholders of the constituent companies."

(VI) The Court of Appeals further held that :

"The present suit is an independent one, and as "its subject matter is distinctly different from that of "the suit in which the United States was complainant, "the duty of this court to independently consider it has "seemed to us to be both plain and imperative."

Here the Court of Appeals states its "duty" is "plain and imperative" to independently consider"

the present case, i. e. that is wholly uninfluenced by the decision and decree of this Court in this Government case.

And it reached that conclusion because

"The present suit is an independent one"

and

"its subject-matter distinctly different"

from that in the Government suit.

We assume (see *supra*) the Court means "cause of action" by the expression

"subject matter."

We urgently insist this was plainly erroneous; that the question of what title the Securities Company acquired in the stocks was, especially in this Court a material and hotly controverted one and was necessarily involved in that case; not the sole question, but a material one.

Yet, let us assume that the Court of Appeals is correct, and that the

"subject matter"

of the present suit was

"distinctly different"

from that in the Government Case:

What follows:

That the Court of Appeals may wholly disegard the findings of fact and conclusions of law in the Government Case:

In the Government case, as we have shown *ante*, this Court did pass upon the question involved in this case and did so because it was a material issue in that case. (See *ante*).

Your petitioners were parties by representation in the Government case, as was the Northern Securities Co. (See *supra*).

Are not the

"right, question or fact,"

and the

"matters in issue"

and the

"points controverted"

in the Government case finally determined, as between petitioners and the Northern Securities Co. by the decision in that case, even though the cause of action or "subject matter" of the present suit are different?

In *Southern Pacific Railroad Company vs. U. S.*, 168 U. S. 1., one of the syllabi of the case is as follows:

> "A right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disturbed in a subsequent suit between the same parties or their privies; and even if the second suit is for a *different cause of action* the right, question or fact once so determined must as between the same parties or their privies be taken as conclusively established so long as the judgment in the first suit remains unmodified."

In *Cromwell vs. County of Sac*, 94 U. S. 352, the Court thus elaborated this doctrine:

> "In considering the operation of this judgment it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action, upon the same claim or demand, and its effect is an estoppel in another action between the same parties upon a *different claim or cause of action.*
>
> "In the former case, the judgment, if rendered upon its merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claims or demand in controversy, concluding parties and those in

privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence.

"But where the second action between the same parties is upon a *different claim* or *demand*, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated or determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Where there are several grounds of recovery or defense on which the decree may have been rested, said decree will be conclusive on the specific finding or ground on which the Court decided the case.

Russell vs. Place, 94 U. S. 606.
De Sollar vs. Hanscome, 158 U. S. 216, 221.
Flint Natl. Bank vs. City of Covington, 129 Fed, Rep. 798.
Hawes vs. Water Co., 5 Sawyer, 287.

The conclusions of this Court in the Government case were as conclusive between the co-defendants—the stockholders of, and the Northern Securities Company itself, as if these stockholders had individually been parties plaintiff or defendant to the litigation.

In *Corcoran against the Chesapeake Canal Company*, 94 United States 741-744, this court said,

"It is said that Corcoran and his co-trustees, the canal company, and the State of Maryland, were all defendants to that suit, and that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had.

The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the Court and passed upon by its decree. * * * *

It is also argued that in that suit Corcoran was only a party in his representative capacity of trustee, and he here sues in his individual character as owner of the bonds and coupons, and in this latter capacity is not bound by that decree. * * * *

But why is he not bound? It was his duty as trustee to represent and protect the holders of these bonds; and for that reason he was made a party, and he faithfully discharged that duty. It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed. If Corcoran owned any of these bonds and coupons then, he is bound, because he was representing himself. If he has bought them since, he is bound as privy to the person who was represented. *Kerrison, Assignee, vs. Stewart, et al.*, 93 U. S. 155, and the authorities there collected."

In *Herman on Estoppel and Res Adjudicata*, the law is thus stated, pp. 154-165;

> "Every person whom the parties plaintiff and defendant represent in the suit are bound as privies by the judgment. A corporation represents and binds the stockholders in all matters within the limits of its corporate power * * *Among the fundamental powers of a corporation are those of bringing and defending suits affecting the rights and obligations of the corporation, in which it represents and binds the stockholders as fully as in the making of contracts.* In any ordinary action or suit agaist the corporation to establish and recover a debt the stockholders are neither necessary or proper parties; they are represented by the corporation; *and if they in their individual capacities are allowed to intervene at all, it can only be in the name of the corporation.* * * * *Hence, whatever, concludes or affects a corporation, binds and concludes all of its stockholders who compose the corporation*, and therefore a judgment against a corporation, unless it was procured by fraud and collusion, is conclusive upon the stockholders, as well as against the corporation and its property."

Secor vs. Singleton, 41 Fed. Rep. 725.
Great Western Tel. Co. vs. Purdy, 162 U. S. 329.
Hawkins vs. Glenn, 131 U. S. 318.

The Court does not define the expression

"subject matter."

We presume it to mean that the purpose and object of the two suits were different. The Government case was to destroy an unlawful combination against commerce, while the present suit is to assert ownership to certain Northern Pacific stock.

If it meant to again assert that the question of the nature of the ownership by the Securities Company was not there considered we have already answered it *ante*.

The identical stock here in controversy—its ownership by the Northern Securities Company—the fact that it, with all the other railroad stocks transferred were the *very means* by which the combination was carried out, and without which stocks the combination could not have been successful, (and therefore were of necessity considered), and that the nature of the title which the Northern Securities Company acquired to the stock was put in issue by the pleadings will be admitted by any one familiar with the Government case—will be proven to any one by reading the pleadings and opinions in that case.

VII. The Court of Appeals also held that the decree of this Court in the Government Case was wholly prohibitory. That it carried out itself without further order, and that a distribution by the Northern Securities Company of the Railroad stocks in a manner distinctly different from the distribution authorized by this Court was not objectionable, though such distribution could not be made unless based upon an absolute ownership by the Securities Company of the railroad stocks, which ownership this Court distinctly denied.

We have practically commented on this hereinbefore, and only add that even if the Court of Appeals be right in this assertion (which we deny), still we were of right entitled to set up the opinion and decree and findings of fact by this court in the Government suit, as conclusive in the litigation at bar. Whether the decree was prohibitory or not is immaterial so far as that question is concerned.

(VIII) In the Government case the issue was sharply made by the bill and answers and especially insisted upon and argued in this court as to whether the Northern Securities Company was a purchaser and became the real, substantial owner of the railroad stocks, or merely a custodian for the railway stockholders, and one of the prayers of the bill was for a decree for the return of the stocks to the persons who assigned them to the Securities Company.

The bill in the Government case *inter alia* alleged, Paragraph XI:

(XI.) "*No consideration whatever has existed, or* will exist, for the transfer as aforesaid of the stock of the defendant railway companies from their stockholders to the Northern Securities Company other than the issue of the stock of the Northern Securities Company to them in exchange thereof for the purpose, after the manner and upon the basis aforesaid.

"*The defendant, the Northern Securities Company, was not organized in good faith to purchase and pay for the stocks of the Great Northern and the Northern Pacific Railway Companies. It was organized solely to incorporate the pooling of the stocks of said companies and to carry into effect the unlawful combination or conspiracy aforesaid. The Northern Securities Company is a mere depository, custodian, holder and trustee of the stocks of the Great Northern and the Northern Pacific Railway Companies, and its shares of stock are but beneficial certificates issued against said railroad stocks to designate the interest of the holders of the pool.*"

The answers were substantially the same, and in answer to Paragraph XI they each denied it and the Northern Securities in addition alleged it was the real owner and purchaser for value of the Stocks.

The answer further alleged the scheme of the Northern Securities Company, was valid and not within the Sherman Act, and the answer further pleaded that to hold the contrary was to demonstrate that the act was unconstitutional, among other reasons, because no one could be deprived of his right to sell his property as he desired or with his money purchase such other property as he coveted.

The prayers of the Bill *inter alia* were:

That the Northern Securities Company and its officers, stockholders and directors

> "be perpetually enjoined from purchasing, acquiring, receiving, holding, voting, (whether by proxy or otherwise) or in any manner acting as the owner of any of the shares of the capital stock of either the Northern Pacific Railway Company or the Great Northern Railway Company; and that a mandatory injunction may issue requiring the Northern Securities Company to recall and cancel any certificates of stock issued by it in purchase of or in exchange for any of the shares of the capital stock of either of said railway companies, surrendering in return therefor to the holders thereof the certificates of stock in the respective railway companies in lieu of which they were issued."

* * * * * * * *

> "FOURTH. That the individual defendants named and their associate stockholders, and each and every stockholder of either of said railway companies who has exchanged his stock therein for the stock of the Northern Securities Company, be each respectively perpetu-

ally enjoined from in any manner voting, holding or acting as the owner of any of the stock of the Northern Securites Company issued in exchange for the stock of either of the said railway companies unless authorized by this court; and that a mandatory injunction may issue requiring each of the said defendants to surrender any stock of the Northern Securities Company so acquired and held by him, and accept therefor the stock of the defendant railway company in exchange for which the same was issued."

FIFTH. To restrain all the defendants

"and their associate stockholders"

from any further combination or conspiracy.

Prayer for general relief.

Opinion of this Court as to issues Raised.

That this court thought that the question of the nature of the title which the Northern Securities Company acquired to the railroad stocks was a material question raised by the pleadings is evident from the several opinions filed in the case.

Mr. Justice Harlan, speaking for the court, and with whom concurred Mr. Justice Brown, Mr. Justice McKenna and Mr. Justice Day, so thought and said. (See our citation *ante*).

Mr. Justice Brewer, from his language on pp. 361 and 362, evidently so thought.

Mr. Justice White, speaking for himself and the Chief Justice, and Mr. Justice Peckham and Mr. Justice Holmes evidently so thought, because on p. 366 Mr. Justice White said as follows:

"Two questions arise: Does the Anti-Trust Act when rightly interpreted apply to the acquisition of ownership by the Northern Securities Company of the stock in the two railroads; and second: if it does, had Congress the power to regulate or control such acquisition and ownership."

"It is said, First, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the real owner of the stock in the railroads, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stocks in the railroads."

(IX.) *There was no urgency or peculiar complication of circumstances that necessitated a speedy final decree in this case, but on the contrary, the complications in the case would seem to require that it should have gone to a final hearing in the ordinary way.*

The only reason the Court of Appeals (Judge Dallas) gives for departing from the ordinary practice in equity cases is that

"the injunction complained of precludes the enjoyment of rights of ownership in property of great value."

The only thing then that it does *preclude* is

"the enjoyment of rights of ownership in property;" and it precludes this only until there can be a final hearing, and the speed with which that final hearing can be had is under the control of the court.

When it is remembered that the security of the property is not at stake; that there is no danger of the destruc-

tion of the property; that the injury from the preclusion of the enjoyment of ownership is protected by a bond of $2,000,000.00; that the disposition of all of the property, the Great Northern and Northern Pacific stocks, *except* the identical Northern Pacific stock which we claim is within the control of the Court, as well as the dividends therefrom and the voting power thereon, it is difficult to see why such preclusion from ownership denies us the rights of the ordinary suitor to go to a final hearing. It would rather seem that the great value of the property in dispute should assure us of that right instead of denying it to us.

(X.) When May the Circuit Court of Appeals on an Appeal from an interlocutory decree enter a final one?

You have considered the question in the following cases:

Smith vs. Vulcan Iron Works, 165 U. S. 524.
Maast, Foos & Co. vs. Stover Mfg. Co., 177 U. S. 494.
Britt vs. Peckham Motor Co., 189 U. S. 58.

From them are to be deduced the following conclusions:

(1) The right of the Circuit Court of Appeals to reverse the lower courts for issuing a preliminary injunction

"when their discretion has not been improperly exercised"

is left open for further discussion and decision.

(2) The power of the Court of Appeals on appeals from preliminary decrees to enter final decrees are limited to cases where—

(a) The merits of the case were fully before the court, and there appears no reasonable *possibility* (not probability) that complainants may succeed.

(b) If a question of fact is involved, the Complainant is of right entitled to put in his testimony and go to final hearing.

Thus, where delay was alleged, the complainant was entitled to go to final hearing and give what excuses he might to explain such delay.

If defendants used *ex parte* affidavits *the complainant was entitled to cross examine the party who made them.*

(c)—Unless the case, as stated in the bill, is

"obviously devoid of equity"

and such defect

"be incapable of remedy by amendment"

as where the case stated does not give jurisdiction to the court in which the bill is filed, or where the relief asked is obviously such as the court cannot grant, and it is apparent the defect cannot be cured by amendment.

(d). In patent cases where the validity of the patent is necessarily raised and involved and a decision against its validity is final, the entry of a final decree seems obvious.

(e). The power to enter such final decree is exceptional and unusual and should be exercised with great caution, and only in cases free from doubt, and where it is plain and certain that there is no

"reasonable *possibility*"

of the complainants' recovering on the whole or any part of their claim.

(f). The practice puts the complainant at a disadvantage. Heretofore in other than patent cases he did not on a motion for a preliminary injunction ordinarily develop his entire proof. This was often impossible and often inexpedient, and sometimes beyond his reach, as when he relied on the books and papers in the hands of the opposite party, or on across examination of defendants' witnesses.

If he is in the Court of Appeals to go really to final hearing, he is practically denied his preliminary motion which is often absolutely essential to his relief, as where in this case the subject matter of the litigation will be hopelessly scattered and the complainant practically remediless.

As Chief Justice Fuller said *ante:*

> "If complainants in every case must understand that a motion for preliminary injunction requires the same showing as the final hearing, very few motions of that sort would be made."

So far as we have been able to find there is not a single case holding where the Bill stated a cause of action and the defendant did not demur but disputed the averments of fact, that the Court of Appeals may, on an appeal from an interlocutory decree where the motion was for a preliminary injunction, and the hearing was on Bill and *ex parte* affidavits, dispose of the case on the merits and enter practically a final decree.

(XI.) The present case was not one where the Circuit Court of Appeals on an appeal from an interlocutory order granting a preliminary injunction, could enter what is practically a final decree, and finally dispose of the case on the merits.

It is not disputed that the bill stated a case for equitable relief. This is demonstrated by the fact that the defendent did not demur to the bill, and after the appeal was taken in this case filed an answer to the same.

The motion in the Circuit Court was for a preliminary injunction and was heard on the bill and *ex parte* affidavits. The opinion of Judge Bradford, who granted the preliminary injunction merely stayed the distribution until final hearing, is referred to.

The action of the Court of Appeals was in effect final. It will permit, the court admits, the dissipation of the stock in suit by its division among, say twenty-five hundred persons, so that if your petitioners were finally held to be entitled to recover, their victory would be a barren one.

The decision avers on its face that it is and is intended to be a determination on the merits and a complete adjudication on the essential questions of law and of fact involved in the case. It renders hopeless any further proceedings in the Circuit Court by proofs or arguments to sustain your petitioners' case.

The Circuit Judge held that the case was one which should go to a final hearing, where both of the parties to the controversy would have an opportunity to cross-examine the adversary's witnesses, to compel the attendance of hostile witnesses and the production of all books and papers that may throw light upon the case, and the intelligent consideration by the Court, in disposing of the question of fact, of all the circumstances surrounding the transaction. The right to do these things was denied to your petitioners by the decision of the Circuit Court of Appeals.

That decision disposed of the question of fact, wholly ignoring the circumstances under which the Northern Securities Company acquired the Northern Pacific stock of your petitioners: wholly disregarded the purposes for which all of the railroad stocks were acquired by the Northern Se-

curities Company: wholly disregarded the purposes for which the Northern Securities Company was organized, and the combination against trade and commerce, of which it was the head and front. Most of these facts were admitted on the hearing for preliminary injunction, but were entirely disregarded by the Court of Appeals in passing upon the question of fact as to the nature of the title the Northern Securities Company acquired to the railroad stocks, though,in our judgment and heretofore in the judgment of this Court, they had a most material and important bearing.

We insist that the Court of Appeals erred in entering what was practically a final decree in this case, because

(a) There were seriously disputed and substantial questions of fact;

(b) There were seriously disputed and substantial questions of law;

(c) The Northern Securities Company had not demurred to the bill of the petitioners and the hearing in the Circuit Court on the motion for preliminary injunction was on bill and *ex parte* affidavits and before an answer had been filed. And the Court of Appeals found the facts *directly contrary* to the averments of the Bill.

(d) The Circuit Court in issuing the preliminary injunction, did not exceed its discretion and this the Circuit Court of Appeals admitted in its opinion, though it misunderstood the purpose for which the injunction was issued, saying that the injunction was issued with the understanding that the Circuit Court of Appeals would on a hearing from the interlocutory decree in the case, enter what was practi-

cally a final decree in the case, though of this intention by the Circuit Judge the opinion of the Circuit Court contains no evidence, but, we respectfully submit, points to the contrary.

(e) The Court of Appeals erred in its disposition both of the questions of fact and the questions of law in the case; and

(f) The Court of Appeals overlooked material questions of fact which were involved in the case, and the determination of which in favor of your petitioners would have entitled them to equitable relief.

Questions of Fact and of Law.

Among the questions of fact and law insisted upon in the Court of Appeals and which arise on this record, are the following:

Among the questions of fact in the case were these:

(1) Was the Northern Securities Company the owner with the right to sell, of the Northern Pacific stock owned by the Oregon Short Line Railroad Company, or, did it acquire the said Northern Pacific stock in pursuance of and in furtherance of the unlawful combination against trade and commerce (and in conflict with the Sherman Law,) by which unlawful combination it was sought to gain and place in the possession of the Northern Securities Company, the agent of the unlawful combination, the control of the Northern Pacific and Great Northern Railroad Companies, and thus restrict trade and commerce, and that *thereafter* the Northern Secu-

rities Company held such railroad stocks really only as trustee and custodian?

We alleged that the Northern Securities Company was not a real owner.

(2) What were the terms of the contract under which the Northern Securities Company acquired the Northern Pacific stock from the Oregon Short Line? Were they similar to the terms of the contracts under which the Securities Company acquired its other Great Northern and Northern Pacific stock, or did they differ.

Was the Northern Pacific stock assigned by the Oregon Short Line in furtherance of the combination to further which the Securities Company was formed to enable the combination the more certainly to control two parallel and competing railroads engaged in inter-state commerce, and with this stock in connection with that of Great Northern *permanently* hold and manage the two railroads in one interest and thus prevent competition between them; and was this to be carried out by a collection of dividends from both roads and a distribution of these dividends among the stockholders of the Northern Securities Company, without regard to who assigned the respective railroad stocks to the Securities Company?

Was a *permanent* holding and thus control of the two railroad companies by the Securities Company the main consideration to petitioners for assignment of its Northern Pacific stock to the Securities Company?

As we show in our petition, the bill alleged that it was, and of this there was no contradiction by the defendants, unless indirectly so by Mr. Hill's affidavit; and in support of the bill, we add the affidavits of Mr. Harriman, the two affidavits of the bill and extracts from the testimony of

Messrs. Hill, Morgan, Clough and others, as set forth in our petition.

(3). Is it true, as averred by the petitioners, that the original parties forming the combination, (Morgan, Hill & Company) still control the Northern Securities Company and own a majority of its stocks? Did these parties, originally in control of the officers and Board of Directors of the Northern Pacific Railroad Company, inequitably and unlawfully, through that control, threaten the Oregon Short Line to retire the Northern Pacific preferred stock, of which the Oregon Short Line was the owner of a majority, in such manner that the Oregon Short Line would be deprived of the same and be compelled to take par, though it was selling in the market at a much greater rate, and Morgan, Hill & Company, as the owners of a majority of the common stock of the Northern Pacific Railroad, be greatly benefitted by being the sole subscribers to the new common stock which the Northern Pacific, under the management of Morgan, Hill & Company, determined to issue at par for the purpose of retiring the preferred stock? And is it true that at the time when the Northern Securities Company was formed by Morgan, Hill and others, and at and before the time when the Oregon Short Line assigned its Northern Pacific stock to the Northern Securities Company that it was induced to do so by the threats of Morgan, Hill & Company to carry out this scheme of retiring the preferred stock of the Northern Pacific, and with the inducement to the Oregon Short Line that by the assignment of its preferred stock in the Northern Pacific and its common stock in the same to the Northern Securities Company that company would with this stock have a majority and control of not only the Great Northern, but the Northern Pacific, and would permanently hold said stocks and manage and control both roads, and divide indifferently the dividends from the two among the holders of the stock

of the Northern Securities Company. (See affidavits of Harriman and extract from Hill, Clough, *et al.*, in our petition.) Did Morgan, Hill and others unfarily value and too high their Great Northern stock and unfairly value and too low our Northern Pacific stock as a basis of exchange for Northern Securities stock? If the facts be as stated and as we allege, then Morgan, Hill & Company now in control of the Northern Securities Company and operating in the name of that company cannot, to the disadvantage of the Oregon Short Line, make a present distribution of its Northern Pacific stock in such way that Morgan, Hill & Company will be greatly benefitted at the expense of the Oregon Short Line and the Oregon Short Line will be compelled to take the Great Northern stock of Morgan, Hill & Company at a high value and Morgan, Hill & Company will take the Northern Pacific stock of the Oregon Short Line at a low value. And this conclusion follows irrespective of the title which the Northern Securities Company took to said Northern Pacific stock, whether as purchaser or custodian.

On these facts, then at least as against Morgan, Hill & Company and so far as their interest in the same goes, we are entitled to our Northern Pacific stock even if there be, which we deny, other Northern Securities Company stockholders whose equities are superior to ours.

We alleged these facts and this result.

(4) Is it true that the railroad stocks originally assigned to the Securities Company are still held by it, and that the certificates of stock of the Northern Securities Company issued for the railroad stocks so assigned can be traced through and into the hands of the assignees, so that a return of the original railroad stocks can be accurately and definitely made?

Petitioners allege that this can be done.

Questions of Law.

(1) As a question of law (likely to frequently arise before this Court in the adjudication as to trusts), what title did the Northern Securities Company take to the Northern Pacific and Great Northern Railroad stocks assigned to it which this Court has held were so assigned in furtherance of a combination against trade and commerce, and contrary to the provisions of the Sherman Act?

Did the Northern Securities Company, though acquiring the stocks in an illegal manner and for an illegal purpose, take a good indefeasible title as purchaser to said stocks as if it acquired them lawfully in the open market.

(2) Did this court, in the case of the *Northern Securities Company against the United States*, 193 U. S. 197, decide that the Northern Securities Company in acquiring the railroad stocks in the Northern Pacific and the Great Northern Railroad, including the stock of the petitioners, only acquire a title as custodian or trustee thereof, and did not become by such acquisition the real substantial unconditional owner?

If it did the Circuit Court of Appeals in the majority opinion admits that its present decision is wrong.

(3) Did this court in the said Government suit above cited, tie up in the hands of the Northern Securities Company the railroad stocks of the Northern Pacific and the Great Northern so that the same could not be sold in the market, they being deprived of the right of collecting dividends or voting the same, and did this court then decree one and only one mode of the Northern Securities Company disposing of that stock, to wit, the return and re-assignment of

the same to the persons who originally assigned said stocks to the Northern Securities Company?

If it did, as we allege, then confessedly the decision of the court below must be wrong, for it approves another and wholly different distribution.

(4) May the Circuit Court of Appeals on an appeal from an interlocutory decree where the case in the Circuit Court went to hearing on a bill and *ex parte* affidavits, and the defendant did not demur to the bill, and the Circuit Court granted a preliminary injunction, on an appeal from such interlocutory decree, decide as if it was a court of original jurisdiction, disregard the discretion which was admittedly properly exercised by the court below, enter what is practically a final decree in the case, and this when there are disputed questions of fact and of law, part of which questions of fact and of law the Circuit Court does not even mention in its opinion?

(5) Has the doctrine of *in pari delicto* anything to do with the decision of the question involved in this case?

Both in the Circuit Court and the Circuit Court of Appeals it was most elaborately argued that it had, and a brief covering several hundred pages was filed in each court on that question alone. We claim that it has nothing whatever to do with the case, and that that was decided and disposed of in the decree of this court in the Government case.

(6) Have the petitioners, as parties to the litigation in the Government case, a right independent of the action of the Attorney General or of the United States Government to insist upon the finality of the findings and decree in that case on all questions of fact and of law that arise in the case at bar?

We assert that they have.

Answer of the Court of Appeals.

Answer to the Questions of Fact.

(1) It answered that the Northern Securities Company was the bona fide purchaser and the absolute owner of the Great Northern and Nothern Pacific railroad stocks.

In doing so it did not take into consideration or give any weight to the circumstances surrounding the acquisition: the purpose for which the stocks were acquired: the fact that the Northern Securities Company had not a real, independent existence but was merely the representative of the railway stockholders: it overlooked the extracts from the testimony of Messrs. Hill, Clough and others (see our petition): it stated results from the testimony of Mr. Harriman which overlooked other portions of his testimony, and disregarded the circumstances under which that testimony was given, and the fair meaning of the words used by him; it made the question of fact turn upon the *words* and not upon the real substantial fact and thus it give a semblance of purchase where in reality there was no real sale or real purchase; it overlooked and never considered whether it was possible in the transfer of stocks to one of several of the combination to accomplish an illegal purpose, that the agent of the combination acquired a good independent title as purchaser; it never even referred to the opinion of this Court as to the circumstances under which and the purposes for which the Northern Securities Company acquired the railroad stocks; because the word *purchaser* was used it relied upon this mere form, and wholly overlooked the substance, as shown by all the surrounding circumstances.

(2) The only answer to the second proposition was the finding of an unqualified contract of sale, and the statement in the opinion as follows:

"Undoubtedly, it was anticipated by the complainants, as well as by all concerned, that the rights ordinaily incident to the ownership of stock including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. An expectation is not a contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration."

The Court reached this conclusion by overlooking the positive averments of our bill, sworn to, and which were not contradicted unless indirectly by Mr. Hill's affidavit, and also overlooked the proofs we submitted in support of the averments as to permanent holdings, to-wit: the affidavit of Mr. Harriman and extracts from the testimony of Messrs. Hill, Morgan, Clough and others, as set forth in our petition.

(3) This question of fact the Court never even noticed in its opinion. It was a material one upon which we were entitled to relief even if the Securities Co. was a purchaser.

(4) This question of fact was not noticed in the opinion, though it is agreed that it was a subsidiary question and not necessary to be noticed in the manner in which the Court below decided the case.

Answer to Questions of Law.

(1) The Court did not discuss or consider or seem to think that this question was raised in the case. It decided the case as if the Northern Securities Company had been organized for a lawful purpose, acquired the stock for a lawful purpose, and there never had been a unlawful combination of which it was the trustee.

(2) It held that this Court had not even

"incidentally"

considered the question.

(3) It held that the portion of your decree referring to the return by the Northern Securities Company to the original assignors of the railroad stocks assigned was permissive only and was entirely consistent with another mode of distribution, which other mode was a denial of the facts on which this Court reached the conclusion and made the decree that it did.

(4) It answered this point in the affirmative.

(5) It did not consider necessary to pass upon this question.

(6) It did not consider this question, though it probably assumes in the opinion that your petitioners had the right to set up the opinion and decree of this court *if* you had passed upon the same.

Oversight of Court of Appeals.

The necessity for a hearing in the ordinary way where each side could put in all its proofs, cross-examine witnesses, compel the attendance of hostile witnesses and the production of all books and papers, is not only apparent from the complications in this case but is further shown by the inaccuracy which the Circuit Court of Appeals fell into in finally considering and passing on the case merely on an interlocutory hearing and upon *ex parte* affidavits.

Thus the Court of Appeals held,

> "The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company was adopted by its Board of Directors at a meeting *at which Mr. Harriman was present* as a member of the Board, and the only authority conferred was "to purchase said stock * * * at an aggregate price of $91,407,500 payable as to $82,491,871 thereof in the full paid and non-assessable shares of the capital stock of this Company at par, and as to $8,915,629 in cash." It is obvious that this resolution contemplated a "purchase" and not a bailment or trust".

The Court fell into error. Mr. Harriman was not present at the meeting of November 15, 1901, when this resolution was passed, as will be apparent by an examination of a certified copy of it on page 382 of the record. Mr. Harriman was present at the meeting of the Board of Directors on November 19, 1901, when it is said the minutes of November 15th were read and adopted, but what, if any, action was taken by him at the time is not stated.

The Court said that the circumstances following the resolution demonstrated the transaction to be a purchase, and then added this:

> "The cash so paid, which amounted to about $7,522,000, was (as is stated in the bill) "used for the purpose of other property and for corporate purposes."

The Court here again fell into error. Paragraph VI. which was referred to, page 4, relates to the receipt of money by the Northern Securities Company and not by the Oregon Short Line Railroad Company.

(XIII) *The Court of Appeals misapprehended the opinion and decree of the Circuit Court (Judge Bradford) in that the Court of Appeals determined that Judge Bradford did not grant a preliminary injunction to hold the STATUS QUO until all the testimony and proofs could be put in and a final hearing could be had, but granted it ONLY UNTIL the Circuit Court of Appeals on an appeal from an interlocutory decree granting the preliminary injunction, could finally pass upon and determine the case.*

In the opinion Judge Dallas said:

> "It appears from the opinion of the learned Judge of the court below that in granting this injunction he was *materially influenced* by the consideration that the questions involved were, as he viewed them, serious and doubtful, and that a decision by him denying the injunction would, if made, not be reviewable upon appeal. We think that upon this ground he was justified in requiring that the *status quo* should be preserved and the subject matter of the controversy be

withheld from dissipation until the judgment of this court could be obtained. But now the substantial rights of the parties only need be considered, and whether the injunction should stand or be dissolved ought, in our judgment, be determined upon the merits and without further delay, *Western Union Telegraph Co. vs. Pennsylvania Railroad Company*, 123 Fed. Rep., 33, 36. There have been cases, it is true, in which it has been held that where the court in the first instance has unreservedly exercised its discretion in granting or refusing a preliminary injunction, its action ought not to be interfered with by an appellate court 'unless there is some strong reason for it.' *Massey vs. Buck*, 128 Fed. Rep. 27.

"But to the circumstances of this case those rulings are inapposite.

"Attentive reading of the opinion of the learned Judge of the Circuit Court has satisfied us that he regarded the fact that an appeal would not lie upon the denial of the injunction as 'of controlling importance,' and that his decision was made with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy by this court. * * * "

If this opinion of the Court is correct, why Judge Bradford filed the elaborate opinion he did—why he considered the facts and the questions of law and went so fully into the authorities, is inexplicable.

An examination of Judge Bradford's opinion we now propose to make, and thus show the misapprehension of the same given in majority opinion of the Circuit Court of Appeals.

The opinion of Judge Bradford begins at page 395 of the record and extends to page 423, and how it is possible to say that Judge Bradford granted the preliminary injunction,

> "with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy in this Court"

and that he was wholly controlled in the granting of the injunction by the fact that an appeal could not be taken by the complainants in the bill if the injunction was refused, is certainly not found in *words* in the opinion of Judge Bradford. On the contrary, that opinion seems undoubtedly to have been based upon the fact that Judge Bradford believed there were serious and doubtful questions in dispute, both of law and of fact, and that it was his duty as a chancellor to hold the *status quo* until the case could be disposed of on final hearing.

Among other things, he says, after a full recital of the averments of the bill, as follows:

> "The defense controverts material allegations in the bill, some of which embody averments of fact and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. On the face of the Bill it is evident that the final decision necessarily will involve the consideration of grave, novel and delicate questions of law. On the presentation of their arguments for and against the awarding of a preliminary injunction, counsel on both sides have, with strong insistence, urged, and with elaboration and signal ability discussed a number of legal propositions, important and farreaching in their scope and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact remains that the eminent counsel advancing them have during a hearing of nearly *three days* pressed them with a zeal and with manifest reliance upon their soundness and materiality."

Again discussing the question of the convenience and inconvenience and the cases where injunction should be issued, the court said, p. 414:

"But this court has power to require of the complainants as a condition precedent to the issue of the injunction, a bond in such form and amount as fully to indemnify all persons who may ultimately be found entitled to such dividends against all loss or damage resulting from the suspension of their payment. On the other hand the denial of a preliminary injunction would, if the complainants should ultimately prevail, render barren their victory so far as relief in this suit is concerned."

"A *pro rata* distribution under the proposed plan of the $39,661,450.00 par value of stock of the latter company (Northern Pacific) included in the amount now sued for among all stockholders of the Northern Securities Company, other than the complainants, would not only debar the latter from any relief to which they may be entitled under their present bill, but to a moral certainty, entail upon them a burdensome multiplicity of suits attended with great labor and expense. It would also obviously be calculated to hinder and embarass, and probably or possibly defeat them in their effort to recover large quantities of such stock from persons purchasing the stock in good faith and for full consideration, directly or indirectly, from the stockholders of the Northern Securities Company participating in such *pro rata* distribution through the creation of new equities on the part of such purchasers.

"In view of the character of the questions involved in this case it would be highly inequitable that the complainants should in advance of any final decision on the merits be put in such a position as to be precluded either wholly or in a large measure from the realization and enjoyment of the fruits which should be

theirs through the immediate result of a final decree in the present case should it ultimately be determined in their favor. * * *"

Judge Bradford, now referring to a number of questions in the case, said:

"It is manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence now before the Court. *They require deliberate investigation in the accustomed mode on evidence taken in due course and in the light of an examination of books and papers produced before a master.*"

* * * * * *

"'The case falls well within the established rule that a preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or of fact ultimately determined are grave and difficult and injury to the moving party will be immediate, certain and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted.'"

Judge Bradford so far has not even mentioned the question that the complainants could not appeal if an injunction were refused—has not even mentioned it, much less relied upon it.

So far the case has been put that it was the duty of the Judge to grant the injunction because there were grave and doubtful questions of fact and of law, and it was a case where in the accustomed mode, evidence should be taken before a master.

Just at the end of his opinion Judge Bradford did add this:

"An appeal does not lie from an interlocutory decree of this court denying a preliminary injunction. *While this consideration is entitled to no weight* where, on the application for an injunction, if it clearly appears that the complainant cannot prevail on the final hearing, it is often of controlling importance where on such application there is room for reasonable doubt as to the ultimate result. Under the circumstances, this court would not be justified in refusing the injunction sought. Such refusal would not be an exercise of sound, judicial discretion. It would not only be improvident in the extreme, but betray peculiar insensibility to the fallibility of human judgment so often accentuated by differences of opinion in even the highest judicial tribunals."

To say that Judge Bradford merely granted this preliminary injunction

"with the understanding that"

it tied up the case until the Circuit Court of Appeals on an appeal from his decree would render practically a final judgment, is, we submit, not proven. It overlooks the extracts we have cited; it is inconsistent with his own language; it is not justified by the opinion, and with great respect it is said it is on a par with the declaration of the Court of Appeals that the decision of the Supreme Court of the United States in the Government Case, 193 U. S. 197, did not even **"incidentally"** consider the question involved in the present controversy, *i. e.*, the title of the Northern Securities Company to the stocks of the Northern Pacific Railway Company.